Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

ALBERT G. BUSTAMANTE,

Petitioner,

v.

UNITED STATES,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a United States Congressman can be convicted of receiving a gratuity under 18 U.S.C. § 201(c)(1)(B), without proof of criminal intent.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

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For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Albert G. Bustamante respectfully prays that a Writ of Certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on February 13, 1995.

OPINION BELOW

The opinion of the court of appeals, styled *United States v. Albert G. Bustamante,* is published at 45 F.3d 933 (5th Cir. 1995), and was entered on February 13, 1995. A copy of the opinion is reproduced at Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 13, 1995. On April 5, 1995, the petition for rehearing and suggestion for rehearing en banc were denied. A copy of the Court's order denying rehearing is reproduced at Appendix B. This petition is filed within ninety days of the denial of the petition for rehearing. SUP. CT. R. 13.4. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title 18 United States Code § 201(c)(1)(B) provides that:

> (c) Whoever –
>
> (1) otherwise than as provided by law for the proper discharge of official duty –
>
> (B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person . . .

> shall be fined under this title or imprisoned for not more than two years, or both.

STATEMENT

The basis for federal jurisdiction in the court of first instance was 18 U.S.C. § 3231.

On November 6, 1984, Petitioner, Albert G. Bustamante, was elected to the United States House of Representatives as the representative for the Twenty-Third Congressional District of Texas. Petitioner served several terms in Congress until his defeat in the general election of November 1992. On February 18, 1993, Petitioner was charged in a ten-count indictment with one count of racketeering (RICO), in violation of 18 U.S.C. § 1962(c); with one count of racketeering (RICO) conspiracy, in violation of 18 U.S.C. § 1962(d); and with eight counts alleging the receipt of unlawful gratuities, in violation of 18 U.S.C. § 201(g), and its successor statute, § 201(c)(1)(B).

Following a jury trial in the United States District Court for the Western District of Texas, Petitioner was acquitted of all counts except the RICO violation charged in Count One, and a gratuity violation charged in Count Four. Petitioner's racketeering conviction was based upon the jury's finding that he committed predicate Racketeering Acts 1 and 3 – the bare minimum for conviction. App. A. at 2-3. Racketeering Act 3 was identical to the gratuity substantively charged in Count Four.

Petitioner was sentenced to a total term of 42 months confinement in the custody of the Bureau of Prisons,

followed by a term of supervised release. Petitioner was fined $55,000 and directed to pay $100 in mandatory assessments in aid of crime victims, pursuant to 18 U.S.C. § 3013.

In Count Four, the government alleged that Petitioner received gratuities in the form of "a loan guarantee . . . and the promise of future loans . . . all at no personal risk to [Petitioner] . . . " for and because of official acts performed and to be performed by Petitioner, otherwise than as provided by law for the proper discharge of official duty. Count Four incorporated by reference Paragraph 11 of the indictment which generally described the overall nature of Petitioner's investment in a corporation called San Antonio Video Corporation. App. C. at 36-39.

As described in Paragraph 11, and at trial, when Petitioner won the Democratic primary election for the Twenty-Third Congressional District in May of 1984, his election to Congress in the November general election was virtually assured. In the summer of 1984, between the primary and general election, two San Antonio attorneys, Mr. Oliver Heard, Jr., and Mr. Larry Macon, formed a corporation called San Antonio Video Corporation (SAVC) for the purpose of acquiring a license for a new television broadcasting station to be awarded by the Federal Communications Commission (FCC). As described at trial, Mr. Heard and Mr. Macon had been friends of Petitioner for more than twenty years and, for this reason, invited him to participate in the venture.

Mr. Macon testified at trial that the costs of the project were to be shared by all of SAVC's shareholders.[1] All shareholders were required to make an initial stock purchase and, if the license were awarded, each would be required to contribute a pro rata share of the start-up costs estimated between $4 million and $5 million. Petitioner's pro rata obligation for the initial stock purchase was $15,000. If the license were awarded, Petitioner would have been obligated to contribute another $650,000 toward the start-up costs.[2]

In April of 1985, Petitioner borrowed $15,000 from Groos Bank in San Antonio to finance his initial stock purchase.[3] With the stock purchase, Petitioner owned a 16.5% interest in SAVC. According to a bank officer, the loan to Petitioner was guaranteed by Oliver Heard. Though the opinion is somewhat unclear on this point, Mr. Heard executed only one guarantee on April 16, 1985, which was general and continuing in nature, and which

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[1] Mr. Macon, Mr. Heard, and Petitioner, each owned a 16.5% equity share in SAVC. The law firm of Heard, Goggin, Blair & Williams held 33% of the equity stock. The voting stock was held by three women.

[2] According to Mr. Macon at trial, had SAVC been awarded the license, he and Mr. Heard intended to borrow the start-up money from a lending institution using the license as collateral. Heard and Macon then intended to lend each investor across the board his or her share of the start-up costs which would be repaid from station revenues. Through his purchase of shares of stock in SAVC, Petitioner would have owned a pro rata share of the license had it been awarded.

[3] The loan was a three-year term loan with payments to be made once each calendar year.

by its terms could be applied by Groos Bank at its election to secure up to $20,000 of loans to Petitioner and his wife.

At trial, Petitioner contended that he had no knowledge that Mr. Heard had guaranteed his loan with Groos Bank and, indeed, first learned of the Heard guarantee when criminal charges were brought against him. Both Petitioner and his wife testified without contradiction that they had never been informed by either Mr. Heard, or by anyone at the bank, of the existence of the guarantee. Petitioner and his wife also testified that they had borrowed money from Groos Bank on other occasions without collateral or other security.[4] It was uncontested that, despite the Heard guarantee, all of the loan documents provided to Petitioner and his wife by the bank reflected that the loan was unsecured. The only documentary evidence of the Heard guarantee appeared on an internal bank document which the bank officer testified was not shown to either Petitioner or his wife.

Apart from the documents, the bank officer testified that Groos Bank did not have a policy requiring that

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[4] The trial evidence showed that Groos Bank had previously loaned Petitioner $50,000 for campaign expenses on an unsecured basis, and without any guarantees. Prior to converting the term note in issue here to an installment note in July of 1988, Petitioner and his wife borrowed $15,000 from Groos Bank toward the purchase of their home in Arlington, Virginia. This loan, too, was unsecured and unsupported by the Heard guarantee. Regardless of whether a particular loan was supported by the Heard guarantee, all of the loan documents tendered to Petitioner and his wife looked identical and reflected that the various loans were unsecured.

guarantees be disclosed to its borrowers. The bank officer testified that he had no specific recollection of informing either Petitioner or his wife of the existence of the Heard guarantee.[5]

Beyond the issue of knowledge, Petitioner defended on the basis that, contrary to the allegation in Count Four, he was "at risk" on the loan from Groos Bank. At trial, the bank officer testified that, even with the Heard guarantee, Petitioner was absolutely at risk on the loan. The court below determined that, although Petitioner may have been at risk on the particular loan, he was not at risk on the investment as a whole. App. A. at 14-15. Despite the charging language in Count Four, which described the gratuity received by Petitioner as a loan guarantee and the promise of future loans, the court below determined that the gratuity actually consisted of the entire "carry" to include the repayment of the loan in October of 1988.[6]

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[5] In finding the circumstantial evidence sufficient to support Petitioner's knowledge of the existence of the Heard guarantee, the court below concluded that, based upon Petitioner's "long friendship with Heard and the context of the entire transaction," the failure of the bank officer to recall informing Petitioner of the guarantee was not fatal to the Government's case. App. A. at 15.

[6] The court's interpretation of Count Four was crucial to its rejection of Petitioner's argument that the acts which constituted the gratuity – the loan guarantee (April of 1985), and the promise of future loans (summer of 1984) – were outside the statute of limitations. Only though a broad interpretation of Count Four, to include the "carry", could the government bring its case within the limitations period.

SAVC was not awarded the license by the FCC. App. A. at 12. SAVC appealed to the FCC Review Board which affirmed the rejection of SAVC's application. *Id.* In July of 1988, SAVC entered into a settlement with the prevailing party in which SAVC agreed to forego any further challenge to the FCC's decision in exchange for a monetary settlement. *Id.* According to Mr. Macon, the settlement was designed to make all of the investors whole by reimbursing them for their out-of-pocket expenses.

During this three year period, Petitioner made no payments on the note.[7] App. A. at 12. In July of 1988, Petitioner refinanced the loan with Groos Bank, including the accrued interest, converting the term loan to an installment note. App. A. at 12. As it had on the original loan, Groos Bank applied Mr. Heard's 1985 guarantee to Petitioner's refinanced loan, though it again tendered documents to Petitioner and his wife which indicated that the loan was unsecured.[8]

On October 24, 1988, SAVC received settlement proceeds in the amount of $175,000 which were deposited into the Heard firm's trust account. App. A. at 12. On October 27, 1988, Mr. Heard wrote a check from the trust account to Petitioner in the amount of $19,467.53 – the

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[7] Though Petitioner did not make his annual payments, at no time did Groos Bank declare the note in default; nor had the loan matured. Similarly, the bank never looked to Mr. Heard for payment.

[8] There was no evidence that Groos Bank would not have loaned money for the SAVC venture to Petitioner or his wife absent the Heard guarantee. The bank officer testified that Petitioner and his wife had excellent credit, and that he had no idea whether the bank would have required a guarantee, or any additional collateral, to approve the loan in issue here.

exact amount Petitioner owed on his outstanding debt to Groos Bank. App. A. at 12-13. Petitioner used his share of the SAVC settlement proceeds to extinguish this debt. App. A. at 13. The $19,467.53 reflected approximately 11% of the gross settlement and did not include $1330.00 in installment payments Petitioner and his wife previously had made to reduce the loan balance.[9] Had Petitioner taken a full 16% share of the settlement, he would have received approximately $28,000. There was no evidence in the record that the check to Petitioner reflected anything other than his share of the settlement proceeds, less his share of the expenses of the investors.

Petitioner moved for judgment of acquittal at the close of the Government's case-in-chief, and at the close of all of the evidence. In reliance on the Second Circuit's decision in *United States v. Muntain*, 610 F.2d 964 (2d Cir. 1979), Petitioner argued that the government had failed

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[9] Though the court below concluded that Petitioner received preferential treatment by Mr. Heard, who repaid Petitioner before payment was made to the other investors, App. A. at 13, there was no evidence in the record that Petitioner was aware that he had been paid in a manner different from anyone else. Petitioner was paid before Mr. Macon's letter, dated October 31, 1988, which proposed a plan for disbursing the settlement proceeds. Petitioner contended that there was no evidence that Heard made an exception for him inasmuch as he was entitled to his pro rata share of the settlement, and was paid at a time when there was no plan in place for its disbursement.

Likewise, the opinion below states that Petitioner's loan at Groos Bank was repaid by Mr. Heard and Mr. Macon. App. A. at 15. ("Heard and Macon gave Bustamante the precise amount needed to repay his investment loan . . . "). In fact, Petitioner was an equity shareholder and, as such, was entitled to a pro rata share of the settlement proceeds, less expenses.

to make any connection between the gratuities alleged and any of Petitioner's official conduct. In Petitioner's case, as in *Muntain*, counsel argued the construction of 18 U.S.C. § 201(c)(1)(B) advocated by the government was too broad.

On appeal, the Fifth Circuit affirmed Petitioner's convictions and sentences in all respects. In rejecting Petitioner's sufficiency challenges to his conviction of Count Four, the Fifth Circuit generally described the Government's burden of proof in this way:

> To find a public official guilty of accepting an illegal gratuity, a jury must find that the "official accepted, because of his position a thing of value 'otherwise than as provided by law for the proper discharge of official duty.' " *Evans*, 572 F.2d at 480. Generally, no proof of quid pro quo is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office. *Id.* at 479; *United States v. Secord*, 726 F.Supp. 845, 847 (D.D.C. 1989) (sufficient for government to show that gratuity was given simply *because of* [a person's] official position, in appreciation for their relationship, or in anticipation of its continuation"). In addition, the jury need not find that the official accepted the gratuity with the intent to be influenced. The jury must only conclude that the evidence established beyond a reasonable doubt that the official accepted unauthorized compensation. *Evans*, 572 F.2d at 480.

App. A. at 13 (emphasis in original). Rejecting Petitioner's argument on *mens rea* – that there must be some connection between the receipt of a thing of value and

official conduct before criminal liability can be imposed – the court had this to say:

> The jury was also entitled to conclude that Bustamante received the SAVC gratuity because of his status as a Congressman. . . . The government produced evidence that Heard's firm called on Bustamante to assist them in his official capacity, demonstrating that Heard had reason to appreciate his relationship with the Congressman and anticipate its continuation. Considering these circumstances, the jury was entitled to find that Heard and Macon sustained Bustamante throughout his SAVC investment because he was a member of the United States Congress.

App. A. at 16.

REASONS FOR GRANTING THE WRIT

Directly contradicting this Court's decision in *United States v. Brewster,* 408 U.S. 501 (1972), the Fifth Circuit has construed 18 U.S.C. § 201(c)(1)(B), to dispense with the requirement of criminal intent. Under the Fifth Circuit's construction of the gratuity statute, substantial criminal penalties may be imposed upon a public official who knowingly receives a thing of value. In *Brewster,* this Court construed the gratuity statute to require a higher level of *mens rea.* Under *Brewster,* the government must prove more than that a public official knowingly received a thing of value, it must prove that the official received the thing of value with knowledge that the donor was paying him compensation for an official act. Beyond the

conflict with *Brewster,* and with opinions from other courts of appeals which have properly applied *Brewster,* the Fifth Circuit's construction of the gratuity statute also conflicts, at least in principle, with this Court's recent decisions on *scienter* in *Staples v. United States,* 114 S.Ct. 1793 (1994); *United States v. X-Citement Video, Inc.,* 115 S.Ct. 464 (1994); and, *Ratzlaf v. United States,* 114 S.Ct. 655 (1994), all of which require that a defendant have knowledge of the fact which makes his conduct criminal. Certiorari should be granted because the decision below conflicts with decisions on the same matter from this Court, and from several other courts of appeals.

Additionally, this Court should grant certiorari because there is some suggestion in both the legislative history of 18 U.S.C. § 201, and this Court's decision in *McCormick v. United States,* 111 S.Ct. 1807 (1991), that a higher level of *mens rea* may be required under the gratuity statute where the defendant is an *elected* public official.

I. THE FIFTH CIRCUIT HAS CONSTRUED 18 U.S.C. § 201(c)(1)(B) IN CONFLICT WITH THIS COURT'S DECISION IN *UNITED STATES V. BREWSTER,* 408 U.S. 501 (1972).

A. *Brewster* Requires Proof That The Accused Had Knowledge That The Donor Was Compensating Him For An Official Act.

In Petitioner's case, the Fifth Circuit has construed 18 U.S.C. § 201(c)(1)(B) in a manner which conflicts with this Court's decision in *United States v. Brewster,* 408 U.S. 501 (1972). In *Brewster* this Court examined a count of the

indictment which charged a former Senator with taking a gratuity in violation of 18 U.S.C. § 201(g), the predecessor statute to § 201(c)(1)(B):

> This count is founded on 18 U.S.C. § 201(g), which provides that a Member of Congress who "asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him" is guilty of an offense. Although the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that appellee solicited, received, or agreed to receive, money *with knowledge that the donor was paying him compensation for an official act.* Inquiry into the legislative performance itself is not necessary; evidence of the Member's *knowledge* of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.

Id. at 527 (emphasis supplied).

B. The Fifth Circuit, Contrary To *Brewster*, Has Dispensed With The *Scienter* Requirement.

The court below did not mention the *Brewster* decision. Rather, in discussing the level of *mens rea* necessary to support a conviction under the gratuity subsection of § 201, the Fifth Circuit relied on two cases, *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978) (en banc); and *United States v. Secord*, 726 F.Supp. 845 (D.D.C. 1989). App. A. at 13.

In *Evans*, the en banc court recognized that any inquiry into the issue of *mens rea* must focus on the defendant's state of mind because "the giving and receiving of an unlawful gratuity are not interdependent offenses; the donee's intent may differ from the donor's." *United States v. Evans*, 572 F.2d at 479.[10] Nonetheless, the court concluded that, under the gratuity subsection of § 201, it is criminal for a public official simply "to accept a thing of value to which he is not lawfully entitled, regardless of the intent of the donor or donee." *Id.* Indeed, under the Fifth Circuit's construction of the gratuity statute in *Evans*, all the government need show is that a public official accepted the things of value "knowingly and purposefully and not through accident, misunderstanding, inadvertence, or other innocent reasons." *Id.* at 479-80. As articulated by the Fifth Circuit in *Evans*, the level of *mens rea* necessary for conviction is the mere "knowing receipt" of a thing of value. Applying this principle to Petitioner's case, the court concluded that the government was required to prove only that Petitioner "knew that Heard and Macon were giving him a risk-free investment in SAVC." App. A. at 15.

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[10] Likewise, the D.C. Circuit has pointed out that it is the defendant's intent which is controlling, and the donor's intent may differ from the donee's. *United States v. Anderson*, 509 F.2d 312 (D.C.Cir. 1974). As stated there:

> Thus, the donor may be convicted of giving a bribe despite the fact that the recipient had no intention of altering his official activities, or even lacked the power to do so.

Id. at 332.

The court below also relied on *United States v. Secord*, 726 F.Supp. 845 (D.D.C. 1989), though *Secord* is readily distinguishable on its facts. Unlike Petitioner, Admiral Secord was not charged with having *accepted* gratuities but, rather, with having *given* them – here, to Lieutenant Colonel Oliver North.[11] In the context of a discovery dispute, the district court stated in *dicta* that, at trial, the government would be required to show merely that Admiral Secord gave Lieutenant Colonel Oliver North things of value "simply because of North's official position, in appreciation for their relationship, or in anticipation of its continuation." *Id.* at 847.

Applying *Secord* to Petitioner's case, the court below focused on the states of mind of Larry Macon and Oliver Heard – the donors in this case – rather than on Petitioner's own. Hence, the court found that the jury was entitled to conclude that Petitioner received the SAVC gratuity because of his status as a Congressman. App. A. at 16. And, further, that:

> Heard had reason to appreciate his relationship with the Congressman and anticipate its continuation.
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> * * *
>
> [T]he jury was entitled to find that Heard and Macon sustained Bustamante throughout his

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[11] While a public official may be convicted of receiving a gratuity under 18 U.S.C. § 201(c)(1)(B), a person may be convicted of giving, offering, or promising a gratuity to a public official under 18 U.S.C. § 201(c)(1)(A). Both subsections of § 201(c), however, require that the receipt or the offer be "for or because of any official act performed or to be performed."

> SAVC investment because he was a member of the United States Congress.

Id. From the foregoing passages, it is apparent that the court affirmed Petitioner's convictions by conflating donor/donee intent.

When it dispensed with the requirement that the government prove that Petitioner had knowledge that the donor was paying him as compensation for an official act, the Fifth Circuit decided an important issue of federal law in conflict with *United States v. Brewster*, 408 U.S. 501 (1972). Certiorari should be granted because of this conflict. *See* SUP. CT. R. 10.1(c).

II. THE FIFTH CIRCUIT'S DECISION DISPENSING WITH THE NECESSITY OF PROVING *SCIENTER* CONFLICTS IN PRINCIPLE WITH DECISIONS FROM THIS COURT.

Traditionally, *scienter* is a necessary element in every crime. *United States v. Balint*, 258 U.S. 250, 253 (1922); *Liparota v. United States*, 471 U.S. 419, 425 (1985).

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Staples v. United States, 114 S. Ct. 1793, 1797 (1994), *quoting, Morissette v. United States*, 342 U.S. 246, 250 (1952).

Offenses that require no *mens rea* are generally disfavored, and this Court has suggested that "some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Id.*

The Fifth Circuit's treatment of the issue of *mens rea* under the gratuity statute cannot be harmonized with the Court's recent *scienter* decisions. In *Staples v. United States, supra,* the issue was whether, to convict a defendant under 26 U.S.C. § 5861(d), making it unlawful for any person to possess a machinegun, the government must prove beyond a reasonable doubt that the person "knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machinegun." *Id.* at 1795. It was the government's contention that, for purposes of liability under the statute, it need only prove that a person know that the weapon he possesses is a firearm in the general sense. *Id.* at 1799. In rejecting the government's argument, this Court pointed out that it has taken particular care "to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.' " *Id.* at 1799, *quoting, Liparota,* 471 U.S. at 426. Thus, this Court held, to obtain a conviction under 26 U.S.C. § 5861(d), the Government must prove that the individual knew the features of his weapon which brought it within the scope of the Act. *Id.* at 1804. In *Ratzlaf v. United States,* 114 S.Ct. 655 (1994), this Court was asked to construe 31 U.S.C. § 5322 and § 5324, which make it unlawful for a person willfully to engage in conduct designed to evade a financial institution's reporting requirements triggered whenever it participates in a cash transaction that

exceeds $10,000. *Id.* at 657. Rejecting the government's argument that structuring is obviously evil and inherently bad – thus satisfying the element of "willfulness" – this Court held that, to support a defendant's conviction under 31 U.S.C. § 5322 and § 5324, the Government must prove that the defendant knew not only of the bank's duty to report cash transactions in excess of $10,000, "but also of his own duty not to avoid triggering such a report." *Id.* at 662.

Finally, in *United States v. X-Citement Video, Inc.*, 115 S.Ct. 464 (1994), this Court construed 18 U.S.C. § 2252, prohibiting interstate trafficking in child pornography. *Id.* at 466. This Court concluded that the term, "knowingly," as used in § 2252, extended to both the sexually explicit nature of the material, and to the age of the performer. *Id.* at 472. In so doing, this Court relied on *Morissette* and *Staples* which instruct that the presumption in favor of a *scienter* requirement should apply to each of the statutory elements which criminalizes otherwise innocent conduct. *Id.* at 469. To construe § 2252 otherwise, this Court recognized, would bring within its reach individuals who had no idea that they were even dealing with sexually explicit material. *Id.* at 467. As but one example, this Court noted that, if a prior tenant had requested delivery of materials covered by § 2252, his residential successor could be prosecuted for mere "knowing receipt" of such materials. *Id.* Such an interpretation of § 2252 extends its reach too far.

The unifying principle of this Court's recent *scienter* cases is that, where a person's conduct is not obviously

criminal, that person must have knowledge of the essential fact which makes his conduct unlawful before felony penalties can be imposed.

The same principle applies to Petitioner's case. Receiving a loan guarantee from a friend of 20 years is not, of itself, criminal. Nor, do we believe, that Petitioner's mere status as a Congressman is sufficient to transform this ordinary act into the felony offense of receiving a gratuity. The Government simply must prove more. This Court's articulation in *Brewster* of the level of *mens rea* necessary to support conviction under the gratuity statute is in harmony with this Court's recent *scienter* decisions in that it requires knowledge of the essential fact which makes otherwise innocent conduct unlawful – here, knowledge on the part of the donee that the donor is compensating him for an official act.

Under all of these authorities, the Fifth Circuit's construction of 18 U.S.C § 201(c)(1)(B) is overly broad, and criminalizes otherwise innocent conduct in the absence of *mens rea*. Certiorari should be granted because the decision below conflicts, in principle, with applicable decisions of this Court. *See* SUP. CT. R. 10.1(c).

III. THE FIFTH CIRCUIT'S CONSTRUCTION OF 18 U.S.C. § 201(c)(1)(B) CONFLICTS WITH DECISIONS FROM OTHER COURTS OF APPEALS ON THE SAME MATTER.

Petitioner has found no case outside the Fifth Circuit which permits a conviction under the gratuity statute based upon a mere "knowing receipt" of a thing of value.

In *United States v. Previte*, 648 F.2d 73 (1st Cir. 1981), the First Circuit expressly adopted the *mens rea* requirement articulated by this Court in *Brewster*:

> In contrast under the gratuity statute, "otherwise than as provided by law for or because of an official act" carries the concept of the official act being done anyway, but the payment only being made because of a specifically identified act, and with a certain guilty knowledge best defined by the Supreme Court itself, *i.e.*, "with knowledge that the donor was paying him compensation for an official act."

Id. at 82; *see also United States v. Biaggi*, 853 F.2d 89, 99 (2d Cir. 1988) (the jury could infer that the "vacations were given and accepted in exchange for Biaggi's efforts on behalf of Coastal"); *United States v. Muntain*, 610 F.2d 964, 968 (D.C. Cir. 1979) (section 201 of Title 18 is an anti-bribery statute aimed at preventing public officials from accepting anything of value in exchange for particular decisions or actions taken or to be taken by the public officials in their official capacity); *United States v. Niederberger*, 580 F.2d 63, 68-9 (3d Cir. 1978) ("What is proscribed, simply put, is a public official's receipt of a gratuity to which he was not legally entitled, given to him in the course of his everyday duties, for or because of any official act performed or to be performed by such public official, and he was in a position to use his authority in a manner which could affect the gift-giver").

In *United States v. Campbell*, 684 F.2d 141 (D.C. Cir. 1982), a municipal judge was convicted of receiving a gratuity from a trucking company who moved the judge without charge. *Id.* at 144. The trucking company had

failed to purchase special use permits for its trucks, resulting in hundreds of traffic tickets for weight violations. *Id.* In over 90% of the company's 1138 tickets which came before Judge Campbell, the judge suspended sentence. *Id.* On another occasion, the judge dismissed a bloc of 95 tickets for the trucking company, though he was not assigned to traffic court that day. *Id.* at n.3.

On the issue of *scienter*, the court of appeals had this to say:

> It is no easy task to articulate the requisite intent necessary to constitute accepting or giving an illegal gratuity. That statute requires that a bribe be given or received "corruptly," whereas the intent required by the gratuity section is expressed by the language "otherwise than as provided by law for the proper discharge of official duty."

Id. at 149. Expressly relying on *Brewster*, the court pointed out that:

> However difficult it may appear for juries to distinguish illegal gratuities from legitimate campaign contributions to elected officials, no similar problems attend deciding whether a judge has accepted gifts "with knowledge that the donor was paying him compensation for an official act."

Id. at 150, *quoting, United States v. Brewster*, 408 U.S. 501, 527 (1972). Accordingly, the D.C. Circuit Court of Appeals found the evidence sufficient to support Judge Campbell's conviction for receiving a gratuity, finding that

"Judge Campbell knew the movers' assistance was a gratuity rendered for or because of his official acts."[12] *Id.* at 146.

The other circuits which have addressed the issue have concluded, as did this Court in *Brewster,* that the statute requires proof that the gratuity was accepted with knowledge that the donor was paying compensation for an official act. Only the Fifth Circuit holds otherwise. Certiorari should be granted in this case because the Fifth Circuit has rendered a decision in conflict with the decisions of other United States courts of appeals on the same matter. *See* SUP. CT. R. 10.1(a).

IV. 18 U.S.C. § 201(c)(1)(B) MAY REQUIRE A HIGHER LEVEL OF *MENS REA* WHEN APPLIED TO THE CONDUCT OF AN *ELECTED* PUBLIC OFFICIAL.

In 1962, Congress recodified existing bribery and conflict of interest statutes, consolidating many of the former laws into a single comprehensive section of the Criminal Code. S.Rep. No. 2213, 87th Cong., 2d Sess., *reprinted in* 1962 U.S. Code Cong. & Admin. News p. 3852. As described in the Senate Report, the recodification of § 201 of Title 18 used substantially the same language as the former statute, and made "no significant changes of substance." *Id.* at 3853.

That there might be defects in the legislation, as it applied to Members of Congress, was recognized prior to passage of the recodification into law. Senator Kenneth B.

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[12] Here, the favorable treatment of the company's traffic tickets.

Keating, for one, expressed the view that, though the legislation modernized and strengthened existing conflict-of-interest laws, it failed to deal with conflict-of-interest problems affecting Members of Congress. *Id.* at 3865. Senator Keating expressed the following concerns:

> Conflict-of-interest questions confront Member of Congress almost daily. For example, should a Representative or Senator vote on matters in which he has some personal financial stake? What are the proper limits on the appointment of relatives to the Member's staff? What kind of outside employment and income are compatible with certain committee assignments? What campaign contributions are properly acceptable and which are not? What are the limits on a Member's representation of constituent interests before the regulatory agencies and other Government departments? Under what circumstances, if any, should Members be permitted to accept fees for speeches to various interest groups?

Id. at 3865. As a consequence of the absence of "legislative machinery" for dealing with these questions, Senator Keating noted, each Member must act on his own judgment which, in light of pressures on him, may be a faulty guide, regardless of his good intentions. *Id.* at 3865. Senator Keating pointed out that, while some conflict-of-interest situations were obvious, others were not very apparent:

> The criminal law, with its requirements of malice and willfulness, does not offer a practical solution for cases in this shadowland of conduct.

Id. at 3866.

This Court, and at least two courts of appeals, have recognized that a higher level of *mens rea* may be required under certain criminal statutes when applied to an elected public official. *McCormick v. United States*, 111 S.Ct. 1807 (1991); *United States v. Evans*, 572 F.2d 455 (5th Cir. 1978) (en banc); *United States v. Brewster*, 506 F.2d 62 (D.C. Cir. 1974). As stated in *Brewster*:

> [W]hether a statute provides fair warning of the conduct it seeks to prohibit depends in part on the persons to whom and the setting in which the statute is applicable.

Id. at 73 n.26, 77 n.40.

In *United States v. Evans*, 572 F.2d 455 (1978), the Fifth Circuit concluded that the level of *mens rea* necessary to support the conviction of a public official under the gratuity statute need be no more than the "knowing receipt" of a thing of value. Importantly, the Fifth Circuit expressly left open the question of whether a higher level of *mens rea* would be required under the gratuity statute when applied to an elected public official. As stated there:

> We need not determine what type of intent would have been necessary had Evans been an elected public official.

Id. at 481 n.30. Inherent in the Fifth Circuit's statement is the recognition that, unlike an ordinary public official, who owes the government his "first and highest obligation," an elected official's duties are more complex. Fundamentally, it is the duty of an elected official to serve his constituents – whether individuals or groups – and to support legislation which benefits both his district and

his constituents. Because of an elected official's special duties, unique problems are presented in the application of a conflict-of-interest statute to the conduct of an individual whose function it is to advocate purely private interests.

As articulated in *Evans*, the broad purpose of the gratuity statute is to reach situations in which the official's judgment might be clouded by the receipt of a benefit. Because a public official owes his professional loyalty first and foremost to the government he serves, the receipt of any unauthorized benefit creates a conflict-of-interest, and, hence, is criminalized under § 201(c)(1)(B). By contrast, because it is the duty of an elected official to advocate the interests of those individuals and groups which make up his constituency, an elected official's conduct does not fall within the broad remedial purpose of the gratuity statute, absent a showing of corrupt intent.

This Court addressed a very similar problem in *McCormick v. United States*, 111 S.Ct. 1807 (1991). McCormick, a state legislator, was indicted under the Hobbs Act for extorting property under color of official right.[13] *Id.* at

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[13] Beginning in 1972, courts began to apply the Hobbs Act to bribery cases. *Id.* at 1819. (SCALIA, J., concurring). As pointed out by Justice Scalia:

> It is acceptance of the assumption that "under color of official right" means "on account of one's office" that brings bribery cases within the statute's reach . . .
>
> * * *

1809. McCormick's conduct consisted of soliciting and receiving campaign contributions from foreign doctors at the same time he was sponsoring legislation for their benefit. *Id.* at 1810.

The court of appeals affirmed McCormick's convictions under the Hobbs Act observing that "nonelected officials may be convicted under the Hobbs Act without proof that they have granted or agreed to grant some benefit or advantage in exchange for money paid to them" and elected officials should be held to the same standard when they receive money other than "legitimate" campaign contributions. *Id.* at 1811. This Court rejected the reasoning of the court below, and construed the Hobbs Act to require a higher level of *mens rea* – that of a *quid pro quo* – when applied to an elected official's receipt of campaign contributions.

> Whatever ethical considerations appearances may indicate, to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interests of some of their constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries, is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, "under color of official right."

Id. at 1816.

[W]here the United States Code explicitly criminalizes conduct such as that presented in this case, it calls the crime bribery, not extortion –
Id. at 1819-20.

Though *McCormick* was expressly limited to an elected official's conduct vis-a-vis campaign contributions, this Court left open the question of whether a *quid pro quo* requirement might exist in other contexts, "such as when an elected official receives gifts, meals, travel expenses, or other items of value." *Id.* at 1817 n.10. Petitioner contends that reasoning identical to that in *McCormick* should apply under the gratuity statute where the defendant is an elected official. Otherwise, the construction of the statute is so broad that the elected official's ordinary acts are transformed into criminal conduct. Indeed, the Fifth Circuit's construction of § 201(c)(1)(B) is so broad that a Congressman is subject to prosecution and conviction if he receives bus fare from a constituent, or accepts a meal, a cup of coffee, or a drink at a bar. Surely, Congress could not have intended that the gratuity statute reach so far.

In the same way that the Hobbs Act was construed to require a higher level of *mens rea* when applied to an elected official's receipt of campaign contributions, we contend that the gratuity statute should be construed by this Court to require a *quid pro quo* when applied to the conduct of an elected official. Certiorari should be granted to decide this important issue of federal law which has not been, but should be, settled by this Court. *See* SUP. CT. R. 10.1(c).

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Honorable Court grant certiorari to review the decision of the court of appeals in this case.

Respectfully submitted,

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Counsel of Record for Petitioner

UNITED STATES of America,
Plaintiff-Appellee,

v.

Albert G. BUSTAMANTE,
Defendant-Appellant.

No. 93-8705.

United States Court of Appeals,
Fifth Circuit

Feb. 13, 1995.

Rehearing and Suggestion for Rehearing
En Banc Denied April 5, 1995.

Former United States Representative was convicted in the United States District Court for the Western District of Texas, Edward C. Prado, J., of violating Racketeer Influenced and Corrupt Organizations Act (RICO), and he appealed. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that evidence supported conviction.

Affirmed.

Nancy Barohn, Bernard Campion, San Antonio, TX, for appellant.

Michael A. Attanasio, Trial Atty., Crim. Div., Jackie M. Bennett, Jr., U.S. Dept. of Justice, Washington, DC, for appellee.

Appeal from the United States District Court For the Western District of Texas.

Before DAVIS, BARKSDALE and STEWART, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Bustamante appeals his conviction and sentence on two counts of a ten count indictment charging RICO and related offenses. We affirm.

I.

Albert G. Bustamante was elected to the United States House of Representatives in November 1984 and served until his defeat in 1992. In 1993, a federal grand jury returned a ten-count indictment against Bustamante, accusing him of using his public office for personal enrichment.

Count One alleged that Bustamante conducted the affairs of an enterprise, his congressional office, through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1962(c). The alleged pattern of racketeering activity consisted of nine predicate acts: accepting a bribe in violation of former 18 U.S.C. § 201(c) (now § 201(b)) and accepting eight illegal gratuities in violation of current 18 U.S.C. § 201(c) and its predecessor, 18 U.S.C. § 201(g). Count Two charged Bustamante with conspiring to violate the RICO statute. In Counts Three through Ten, the same eight acts of accepting illegal gratuities were charged as individual violations of the gratuity statutes.

After a two-week trial, the jury found Bustamante guilty of Counts One and Four and acquitted him of the other charges. To support the RICO conviction, the jury found that Bustamante had committed Predicate Act One

(accepting the bribe) and Predicate Act Three (accepting the same illegal gratuity charged in Count Four).

Using the United States Sentencing Guidelines, the district court sentenced Bustamante to concurrent terms of incarceration of 42 months on Count One and 23 months on Count Four, and concurrent terms of supervised release of two years on Count One and one year on Count Four. Bustamante was also ordered to pay total fines of $55,000 and a $100 special assessment.

Bustamante challenges his convictions and sentence on numerous grounds which we consider below.

II. Sufficiency of the Evidence

Bustamante contends that the government failed to produce sufficient evidence to support his conviction on either the bribery charge (Predicate Act One) or the illegal gratuity charge (Predicate Act Three/Count Four). As Bustamante correctly points out, his RICO conviction is based on only two predicate acts, the minimum number required to establish a pattern of racketeering activity. 18 U.S.C. § 1961(5). If the evidence is insufficient to support the jury's finding that Bustamante committed either predicate act, his RICO conviction must be overturned.

This Court will uphold a conviction as long as a rational trier of fact could have found that the evidence established the elements of the crime beyond a reasonable doubt. *United States v. Pofahl*, 990 F.2d 1456, 1467 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 266, 126 L.Ed.2d 218 (1993). The jury is free to choose among reasonable constructs of the evidence, which need not exclude every

reasonable hypothesis of innocence. *United States v. Maseratti*, 1 F.3d 330, 337 (5th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1096, 127 L.Ed.2d 409 (1994). We view all inferences from the evidence in the light most favorable to the jury verdict. *United States v. Basey*, 816 F.2d 980, 1001 (5th Cir.1987). With these ground rules in mind, we turn to the particular facts and proof of each predicate act.

A. The Bribe

As Predicate Act One, the indictment alleged that in February 1986, Bustamante accepted a $35,000 bribe in exchange for using his official influence on behalf of Falcon Food Services and Management, Inc. (Falcon Foods). Since 1983, Falcon Foods had held the food service contract for Lackland Air Force Base (Lackland) in San Antonio, Texas. This contract was set to expire in 1986, when the Air Force planned to conduct a competitive bidding process to award a new multi-million dollar contract. Hoping to win the renewed contract, Falcon Foods enlisted Bustamante's aid.

In late 1985, Bustamante invited Brigadier General Richard Gillis to lunch at a private club in San Antonio. At that time, General Gillis was in charge of the San Antonio Contracting Center, which handled all procurement for military bases in the region, including Lackland. At trial, General Gillis testified that he believed he would be having lunch only with Bustamante and did not expect to discuss the Lackland contract.

When General Gillis arrived at the club, Bustamante introduced him to Douglas Jaffe, Jr., owner of Falcon

Foods, Evaristo "Eddie" Garcia, president of Falcon Foods, and Morris Jaffe, Douglas Jaffe's father. During lunch, Douglas Jaffe (Jaffe) persistently tried to persuade General Gillis that Falcon Foods was doing a good job at Lackland and should have its contract renewed. Prohibited by regulations from discussing a contract that was open to bidding, General Gillis became increasingly uncomfortable with Jaffe's lobbying effort. When his repeated attempts to change the subject were unsuccessful, General Gillis left the club.

In January of 1986, a $223,000 promissory note bearing Bustamante and his wife's signatures came due. By mid-February, the Bustamantes had paid (or made arrangements to pay) all but $35,000 of the amount owed. On February 15, although he had not yet received the remaining $35,000 from any source, Bustamante wrote a check that completely satisfied the promissory note.

Three days later, Bustamante received a check for $35,000 from Garcia, which he deposited into his bank account. This check bore the handwritten notation "sale of note." This notation allegedly referred to a $35,000 second lien note that Bustamante held on a former home. Bustamante claimed that he sold this second lien note to Garcia to raise the money to pay off the balance of the $223,000 promissory note. However, no other written documentation of the alleged sale was produced as trial. Additionally, though it had a face value of $35,000, in February 1986 the second lien note's present value was only $22,000.

At the time he wrote the check to Bustamante, Garcia only had $493.42 in his checking account; within a few

days, Garcia's account had overdrawn by more than $34,000. Douglas Jaffe wrote Garcia a $35,000 check from Jaffe's personal account, which Garcia deposited on February 24.

At some point in February, Bustamante also applied for a $35,000 loan from San Antonio Savings Association (SASA). On February 25, SASA approved the loan. Bustamante took no prompt action on the loan.

On March 4, Bustamante placed a telephone call to Isodoro Leos, the officer assigned to handle the Lackland contract, and left a message complaining about the fact that the Air Force had delayed bidding on the Lackland contract. Returning the call, Leos informed Bustamante's secretary that the Congressman should make his future inquiries in writing.[1]

The next day, Bustamante closed on the SASA loan and executed a $35,000 promissory note. Bustamante secured the loan with the same second lien note he claimed to have sold to Garcia weeks earlier. On March 14, SASA issued a $35,000 cashier's check to Bustamante, representing the principal of the loan. The back of the check showed that Bustamante endorsed both his and his wife's names. The check also bore a typewritten notation stating "Deposit Only to the HSB Construction Inc. Account" and listing an account number. HSB Construction belonged to Douglas Jaffe. Unlike most of Jaffe's

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[1] The government argued that this event made Bustamante realize that his illicit advocacy might be exposed, causing him to take action to cover up the money he had received.

companies, however, HSB Construction was not a subsidiary of Jaffe's corporate umbrella, the Jaffe Group, Inc.

On March 18, the Air Force opened the sealed bids for the Lackland Contract. Falcon Foods had submitted the highest of seven bids. Following standard procedure, the Air Force began to work its way up from the bottom of the list, looking for the lowest bidder that was also "responsive and responsible," factors having to do with the contractor's ability to carry through on its promised performance. After disqualifying the two lowest bidders, the Air Force found itself running out of time to hire a new contractor before the existing Falcon Foods contract expired on April 30.

To ease the time crunch, on April 17 the Air Force attempted to exercise its contractual option to temporarily extend its existing contract. Unfortunately for the Air Force, the notification deadline had expired two days earlier. No longer bound by the contract, Falcon Foods responded with a counter-offer that was $150,000 more per month than it had previously charged. The Air Force rejected the counter-offer. Afraid that it would not find a qualified bidder by April 30, the Air Force decided to place the new contract through a faster minority set-aside program operated by the Small Business Administration. In this manner, the Air Force awarded the Lackland contract to Aleman Food Service (Aleman Foods). Aleman Foods had been the fourth lowest bidder.

On April 24, the day of the award to Aleman, Leos received a call from Bustamante, who insisted that Leos explain why the original bidding process had been scuttled. Dissatisfied with Leos, Bustamante next berated

Leos' boss, the deputy director for contracting. Still unplacated, Bustamante telephoned General Gillis and expressed his anger that Falcon Foods had not been awarded the Lackland contract. Bustamante threatened General Gillis that he had "better turn this around" or Bustamante would end his career. On April 25, Bustamante wrote to the General Accounting Office demanding an explanation of the award to Aleman Foods. At approximately the same time, another disgruntled bidder obtained a restraining order that prohibited Aleman Foods from serving food until all protests to the award were resolved. Left with no food service contractor, the Air Force fed its troops prepackaged meals from its war reserve stock from May 1 to July 31, when Aleman Foods was finally allowed to begin meal service.

To find bribery, the jury is required to find that a public official accepted a thing of value in return for being influenced in the performance of an official act. *United States v. Evans*, 572 F.2d 455, 480-81 (5th Cir.), *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978).

Bustamante first contends that the government produced insufficient evidence for the jury to decide that his actions on behalf of Falcon Foods were "official acts." This contention is spurious. Without question, Bustamante took action in his official capacity as a congressman on a "matter" (the award of a government food service contract) which was "then pending." 18 U.S.C. § 201(a)(3).

Bustamante next argues that the jury could not legitimately find that the $35,000 payment from Garcia was a quid pro quo for any assistance he gave to Falcon Foods.

First, Bustamante maintains that he provided an entirely innocent explanation for the $35,000 that he received from and returned to Garcia. Bustamante testified that he was on his way to SASA to borrow the $35,000 he needed to pay off his promissory note when he told Garcia, a long time friend, about the planned loan. Garcia offered to buy Bustamante's second lien note instead. Bustamante accepted, not knowing that Garcia did not have enough money to make the purchase himself. Bustamante bought back the second lien note, however, because his wife did not approve of the sale. Bustamante had already used Garcia's $35,000 to pay off his own promissory note, so he went to SASA for a loan after all, to get the money to reimburse Garcia. Bustamante asserts that he did not know that the money for the purchase really came from Jaffe, nor that the money he repaid to Garcia ended up in Jaffe's account. However, Bustamante's explanation is the type of alternative hypothesis of innocence that the jury need not exclude when reaching a guilty verdict. *Maseratti*, 1 F.3d at 337.

Bustamante also argues that the evidence does not persuasively support the government's cover-up theory – that Leos' instruction to communicate in writing spurred Bustamante to incur the SASA loan for the purpose of hiding the $35,000 payment. However, disregarding the government's cover-up theory, the evidence was more than sufficient for the jury to find that Bustamante accepted a bribe in violation of 18 U.S.C. § 201(b). Bustamante received a large amount of money from the principals of Falcon Foods at a time when Falcon Foods needed Bustamante's assistance and when Bustamante needed the funds. Neither Bustamante nor Garcia documented

the "sale" of the second lien note in any standard manner. Garcia, a successful businessman, supposedly purchased this second lien note at a price $13,000 higher than its present value. Though Garcia appeared to make this purchase, it was Jaffe who actually supplied the money. Additionally, Bustamante telephoned a brigadier general and threatened to end his career if the Lackland contract was not re-awarded to Falcon Foods. Given these facts, the jury's guilty verdict must stand. *See United States v. Biaggi*, 909 F.2d 662, 683-84 (2d Cir.1990), *cert. denied*, 499 U.S. 904, 111 S.Ct. 1102, 113 L.Ed.2d 213 (1991).

B. The Illegal Gratuity

As Predicate Act Three and Count Four, the indictment alleged that Bustamante accepted an illegal gratuity. Unopposed in the 1984 general election, Bustamante's seat in Congress was a foregone conclusion once he won the primary election. In the period between the primary and general elections, Bustamante was invited to participate in a fledgling company called San Antonio Video Corporation (SAVC). SAVC had been organized by Oliver S. Heard and R. Lawrence Macon, both local attorneys and friends of Bustamante. Heard and Macon formed SAVC to compete for the Federal Communications Commission (FCC) license for a commercial television station.

On November 29, 1984, a few weeks after the general election, SAVC filed its licensing application with the FCC. Although the application listed Bustamante as owning 18.5 percent of SAVC, he had not actually contributed any money at that time.

To purchase his share of SAVC, Bustamante was expected to make an initial *pro rata* contribution of approximately $15,000. This would entitle Bustamante to 16 percent of the non-voting stock; Heard, Macon, and Heard's law firm also owned portions of the non-voting stock. SAVC also issued voting stock which was owned by three minority women.[2]

In the event the SAVC was fortunate enough to win the FCC license, Bustamante was expected to make a second contribution of $650,000 toward the roughly $5 million start-up cost. Like several of the other investors, Bustamante did not have the financial strength to contribute such a substantial sum. Heard and Macon planned to borrow the start-up cost using the FCC license as collateral, then lend this money to the other investors, including Bustamante. Macon testified at trial that, if push came to shove, he would not have forced Bustamante to repay this loan.

Bustamante did not even have the initial $15,000 on hand. To make his up-front stock purchase, Bustamante applied for a $20,000 loan from Groos Bank in San Antonio in April 1985 (the Groos Bank loan). According to an internal bank document entitled "Loan Application" the loan was needed to "[i]nvest in a new television broadcasting company" and was "made as a result of a specific request on the part of Oliver S. Heard, Jr., Guarantor." The Loan Application included Heard's financial statement, his net worth and annual income. Just three days

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[2] The fact that SAVC would be controlled by minority women entitled it to a "comparative preference" during the FCC licensing process.

earlier, Groos Bank had granted the Bustamantes another $20,000 loan, for personal purposes, which was also "based on the specific request and financial strength of guarantor Oliver S. Heard, Jr."

As part of the FCC's licensing procedure, SAVC and its rivals litigated their claims before an administrative law judge (ALJ). In May 1985, as part of this process, Bustamante testified about his initial stock purchase as well as the potential $650,000 future payment. Bustamante testified that he had taken out the Groos Bank loan to make his initial stock purchase in the fall of 1984. Bustamante denied that Heard had guaranteed this loan.

The FCC litigation extended over a number of years. During this time, three installments on Bustamante's Groos Bank loan became due in April 1986, 1987, and 1988. Bustamante missed all three of these payments. On April 20, 1988, Groos Bank allowed Bustamante to renew the loan by relying on Heard's original guaranty. At the same time, Bustamante took out another loan to cover the accumulated interest on the original Groos Bank loan; this loan was also covered by the Heard guaranty. In July 1988, Bustamante combined both of these loans into a single $20,140.69 obligation. Like each of the previous loans, this consolidation loan relied on Heard's guaranty. Bustamante made two of the monthly installment payments on this loan.

In October 1988, the FCC litigation finally ended. SAVC was not awarded the FCC license, but did get $175,000 in settlement from the company that did receive the license. On October 27, 1988, three days after SAVC received the settlement, Heard issued Bustamante a check

for $19,467.53, the exact amount that Bustamante still owed to Groos Bank. Bustamante immediately repaid the consolidated Groos Bank loan in full.

SAVC's other investors did not receive such priority treatment. On October 31, 1988, Macon wrote a letter to Heard stating that before the shareholders would receive refunds of their *pro rata* contributions, the settlement money would be used to pay off SAVC's outstanding bills. This included loans that Heard and Macon had made to SAVC during its lengthy effort to obtain the FCC license. The record does not reflect whether the other SAVC shareholders ever received their share of the settlement proceeds.

To find a public official guilty of accepting an illegal gratuity, a jury must find that the "official accepted, because of his position, a thing of value 'otherwise than as provided by law for the proper discharge of official duty.' " *Evans*, 572 F.2d at 480. Generally, no proof of a quid pro quo is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office. *Id.* at 479; *United States v. Secord*, 726 F.Supp. 845, 847 (D.D.C.1989) (sufficient for government to show that gratuity was given "simply *because of* [a person's] official position, in appreciation for their relationship, or in anticipation of its continuation"). In addition, the jury need not find that the official accepted the gratuity with the intent to be influenced. The jury must only conclude that the evidence establishes beyond a reasonable doubt that the official accepted unauthorized compensation. *Evans*, 572 F.2d at 480.

Bustamante's challenges to his illegal gratuity conviction rely on his interpretation of the charge against him. According to Bustamante, the indictment alleges only that he accepted two specific things of value: Heard's Groos Bank loan guaranty for the initial loan to purchase SAVC stock and the promise of future loans in the amount of $650,000, both at no risk to himself. Bustamante argues that his conviction for accepting these two things of value is invalid because the government failed to prove (1) that he knew of Heard's loan guaranty and (2) that the Groos Bank loan was actually risk-free.

Bustamante views the charge too narrowly. Bustamante was not merely accused of accepting these particular guarantees and promises, but of allowing Macon and Heard to shoulder the responsibility for his SAVC investment from start in 1984 to finish in 1988. Bustamante is correct that the indictment alleges that he accepted "Loan Guarantees ($20,000) and Promises of Loans ($650,000)", and "a loan guarantee for the purchase of stock and the promise of future loans for additional investment in [SAVC], all at no personal risk. . . . " However, the indictment also describes the broader investment scheme of which these loans were a part. For example, the indictment alleges "[Bustamante] was invited by SAVC's controllers to participate in SAVC at no personal risk to himself." The government's counsel, without objection from Bustamante, succinctly explained its theory to the jury in closing argument: "[t]he crime is a carry, a carry of Albert Bustamante in this transaction."[3]

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[3] Bustamante does not argue that this characterization or the proof at trial were fatally at variance with the indictment. In

Viewed in this light, the proper question is whether Bustamante knew that Heard and Macon were giving him a risk-free investment in SAVC. We are convinced that the above evidence was sufficient to allow the jury to find that Bustamante rested firmly on Heard and Macon's shoulders for the SAVC investment. In addition, the Groos Bank officer who handled Bustamante's loans, Neyland Allen, testified that he knew of only one instance in Groos Bank history in which the bank had purposefully kept a guarantor secret from the borrower. Given Bustamante's long friendship with Heard and the context of this entire transaction, the fact that Allen could not specifically remember informing Bustamante of Heard's guaranty is not fatal. Bustamante also emphasizes that he himself testified that he did not know of the guaranty. However, the jury was free to reject this testimony. *United States v. Anderton*, 679 F.2d 1199, 1202 (5th Cir.1982).

Likewise, Bustamante's argument that the government failed to prove that the Groos Bank loan was risk-free misses the mark. The government was required to prove what it alleged – a risk-free investment carry, not a risk-free loan. Heard and Macon gave Bustamante the precise amount needed to repay his investment loan, which exceeded the amount he actually invested, at a time when they were not repaying other investors. This fact alone strongly supports the jury's conclusion that Bustamante's SAVC investment was risk-free.

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fact, in another section of his own brief, Bustamante argues that Count Four described a "single, continuing gratuity violation" that ended in 1988.

Leaving no stone unturned, Bustamante also suggests that the government was required to prove that the gratuity was given in exchange for an official act. As we noted above, this is not the government's burden.

The jury was also entitled to conclude that Bustamante received the SAVC gratuity because of his status as a congressman. Bustamante was invited to invest after his seat in Congress was assured. He brought no broadcasting experience to SAVC. Because he owned non-voting stock, his Hispanic ethnicity did not contribute to the minority preference. His inclusion certainly added no financial strength to the venture. The government produced evidence that Heard's firm called on Bustamante to assist them in his official capacity, demonstrating that Heard had reason to appreciate his relationship with the Congressman and anticipate its continuation. Considering these circumstances, the jury was entitled to find that Heard and Macon sustained Bustamante throughout his SAVC investment because he was a member of the United States Congress.

C. The Pattern of Racketeering Activity

Bustamante argues next that, even if the evidence establishes both predicate racketeering acts, the government did not prove a pattern of activity within the meaning of the RICO statute. To establish a pattern of racketeering activity, the government must show a series of at least two related predicate acts that constitute a threat of continuing racketeering activity. *Tel-Phonic Services, Inc. v. TBS Intern., Inc.*, 975 F.2d 1134, 1139-40 (5th Cir.1992) (citing *H.J. Inc. v. Northwestern Bell*, 492 U.S. 229,

109 S.Ct. 2893, 106 L.Ed.2d 195 (1989)). At the time of his trial, Bustamante was no longer in office. Thus, to satisfy the continuity requirement, the government had to establish "a closed period of repeated conduct," which it could do by showing "a series of related predicates extending over a substantial period of time." *H.J. Inc.*, 492 U.S. at 241, 242, 109 S.Ct. at 2901, 2901.

Bustamante concedes that Predicate Acts One and Three are related but argues that they are not sufficiently continuous. Again, Bustamante's argument depends primarily on his constricted interpretation of the acts comprising his acceptance of the SAVC gratuity. Bustamante argues that the gratuity offense was completed in 1985, when he accepted the loan guaranty and the promise of future loans. He contends that when the gratuity is added to the 1986 Falcon Foods bribe, his racketeering activity occurred over a short, isolated period of approximately eleven months. On this basis he maintains that the evidence was insufficient to permit the jury to find either that his racketeering acts covered a substantial period of time or posed a threat of ongoing activity.

Bustamante's argument is belied by the record. As discussed above, the record reveals that Bustamante did more than accept the loan guaranty and promise of future loans in 1985 – he continued to allow Heard and Macon to carry him. This gratuity did not end until Bustamante accepted the 1988 loan repayment. Bustamante's racketeering acts therefore continued for a period of nearly four years. This time period is substantial. See *United States v. Pellulo*, 964 F.2d 193, 209 (3d Cir.1992); *Metromedia v. Fugazy*, 983 F.2d 350, 369 (2d Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2445, 124 L.Ed.2d 662 (1993).

In addition, the jury was entitled to conclude that Bustamante's actions amounted to a threat of continuing criminal activity. Indeed, the gratuity itself threatened to continue as long as the SAVC investment continued; had SAVC obtained the FCC license, Heard and Macon probably would have sustained Bustamante's investment for a much longer period of time. Bustamante makes much of the fact that the jury found him not guilty of the other seven alleged racketeering acts. However, these acquittals are not inconsistent with the jury's conclusion that Bustamante's criminal behavior threatened to continue, at least during the closed-end four year period of activity. *See United States v. Freeman*, 6 F.3d 586, 596 (9th Cir.1993) (by their nature, crimes such as bribery suggest the threat of long term activity).

III. Statute of Limitations

Bustamante argues that his prosecution for the SAVC gratuity is barred by the five year statute of limitations in 18 U.S.C. § 3282.[4] He contends that the limitations period started to run when he first accepted the gratuity in 1985 and that it expired in 1990 long before his 1993 indictment.

Bustamante relies on *United States v. Hare*, 618 F.2d 1085 (4th Cir.1980), in which the defendant accepted an

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[4] At trial, Bustamante first raised this defense in a post-verdict motion for acquittal. Because we find that the gratuity charge is not barred by the statute of limitations, we decline to address whether, under the circumstances of this case, Bustamante's failure to raise this issue earlier amounts to waiver.

illegal gratuity in the form of a loan with favorable interest and payment provisions. Hare accepted the loan in 1970 and made periodic payments on the loan until 1975. Because Hare was not indicted until 1979, he argued that the five year limitations period had expired. The court agreed, holding that the gratuity was complete when Hare received the loan and that the statute of limitations could not be extended simply because Hare continued to benefit from the favorable terms every time he made a payment. The court based its decision on *Toussie v. United States*, 397 U.S. 112, 90 S.Ct. 858, 25 L.Ed.2d 156 (1970), which held that the doctrine of continuing offenses should be applied sparingly, to avoid undermining the congressional policy of repose.

Hare is distinguishable from Bustamante's case. The *Hare* Court itself limited its holding to the specific facts alleged in Hare's indictment, which asserted that Hare committed one act of accepting a gratuity in 1970. *Hare*, 618 F.2d at 1087. In contrast, Bustamante's indictment charges that his acts of accepting the SAVC gratuity extended over a period of years. As we explained in the previous section, Bustamante is not accused of committing a crime that has continuing effects after its completion. Rather he was charged with accepting illegal gratuities over an extended period of time. Unlike Hare, Bustamante was therefore charged with continuing criminal behavior. Accordingly, we find that Bustamante's acceptance of the SAVC gratuity occurred within the five

year limitations period.[5] See *United States v. Morales*, 11 F.3d 915, 918 (9th Cir.1993).

IV. Defense Witness Immunity

Bustamante argues next that the district court erred by not granting immunity to a trial witness, Eddie Garcia, pursuant to a grand jury immunity order. In September 1992, the government subpoenaed Garcia to testify before the grand jury investigating Bustamante. The government applied for and received an order compelling Garcia to testify under a grant of immunity. Both the application and order were captioned "IN RE GRAND JURY PROCEEDINGS" and given the cause number "SA92CR270." Under this order, Garcia testified before the grand jury twice.

In February 1993, the indictment against Bustamante was returned, creating cause number "SA93CR039." Garcia was subpoenaed by the government to testify at Bustamante's trial. When he received his trial subpoena, Garcia's attorney wrote a letter to the government stating that, if called at trial, Garcia would invoke the fifth amendment and refuse to testify because "it is our belief the [former immunity order] does not extend to any testimony, other than grand jury testimony, requested of him in this case." After receiving no response, Garcia

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[5] This holding precludes Bustamante's argument that the district court should not have sentenced Bustamante under the United States Sentencing Guidelines. *United States v. Devine*, 934 F.2d 1325, 1332 (5th Cir.), *cert. denied*, 502 U.S. 929, 112 S.Ct. 349, 116 L.Ed.2d 288 (1991) (guidelines apply to offense initiated but not completed before October 31, 1987).

filed a motion with the trial court requesting a protective order immunizing his trial testimony and stating that the former immunity order "did not specifically require or compel [Garcia] to testify in [SA93CR039]."

Although the government never called Garcia as a witness during the trial, Bustamante did. When Bustamante was ready to call Garcia to testify, Bustamante's attorney informed the trial court that Garcia wished to speak with the court. Garcia told the court that he wanted to testify but that "I'd like to have . . . immunity . . . I think it's only fair for me to have immunity." When the court asked if Garcia would be receiving immunity, the government responded that Garcia had been given immunity before the grand jury but that he would not be granted immunity for his testimony at trial. The government explained that it believed that Garcia had perjured himself in his grand jury testimony.

Garcia's attorney then appeared in court to explain that, despite his earlier statements, he believed that the language of the immunity order granted Garcia immunity throughout the grand jury proceedings *and* the trial. Garcia's attorney explained that at the time he had written the letter and motion, he did not possess a copy of the immunity order and had only seen it briefly, immediately before Garcia's grand jury appearance. After listening to both Garcia's attorney and the government, the trial court ruled that the immunity order only applied to Garcia's testimony before the grand jury. Believing that Garcia would not testify without immunity, Bustamante did not call him as a witness.

Bustamante now argues that the district court incorrectly interpreted Garcia's immunity order. Bustamante cites several decisions holding that the court must interpret an immunity agreement generously to protect the witness's fifth amendment right against self-incrimination. However, these decisions describe the rights of the party to the immunity agreement, not the rights of a third party. Garcia's personal rights under the agreement cannot form the foundation for Bustamante's own claim on this issue.[6]

Neither party cites, nor can we find, any case describing a defendant's right to assert error based on a trial court's interpretation of another person's immunity order. Our review of the existing case law makes clear that a defendant's rights are only implicated by a third party's immunity status when that status intrudes on the defendant's due process protections. In *United States v. Chagra*, 669 F.2d 241, 259-61 (5th Cir.), *cert. denied*, 459 U.S. 846, 103 S.Ct. 102, 74 L.Ed.2d 92 (1982), we held that the sixth amendment compulsory process right does not enable a defendant to "demand that the government shield a witness from the consequences of his own testimony." It is also settled that, unless the government has abused its immunity power, a defendant has no due process right to have the trial court immunize defense witnesses. *United States v. Follin*, 979 F.2d 369, 374 (5th

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[6] Neither Bustamante nor the government frames this as an issue of standing. It is sufficient for us to note that Bustamante has provided no reason why he should escape the general rule that a litigant cannot base her own claim on the legal rights and interests of a third party. *United States v. Shaw*, 920 F.2d 1225, 1229 (5th Cir.), *cert. denied*, 500 U.S. 926, 111 S.Ct. 2038, 114 L.Ed.2d 122 (1991).

Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 3004, 125 L.Ed.2d 696 (1993); *United States v. Thevis*, 665 F.2d 616, 638-41 (5th Cir.), *cert. denied*, 456 U.S. 1008, 102 S.Ct. 2300, 73 L.Ed.2d 1303 (1982). In addition, a defendant cannot prevent the government from revoking a prior grant of immunity when the government has a good faith belief that the witness testified falsely. *United States v. Taylor*, 728 F.2d 930 (7th Cir.1984). These decisions illuminate the underlying principle that a defendant only has grounds to complain about the treatment of a witness's immunity when the government is using its immunity privilege to unfairly skew the facts presented to the jury, thereby breaching the defendant's right to due process of law. Accordingly, we evaluate Bustamante's claims under this standard.

Bustamante maintains that the government's interpretation of Garcia's immunity order is unfair because it is inconsistent with the manner in which the government treated another witness. Bustamante contends that the government informed the trial court that this witness's immunity order, identical to Garcia's, extended to testimony at trial. However, we do not read the government's statements in this way; in fact, it appears that the government was asking the court to extend the former order to apply to the trial.[7]

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[7] The actual interchange was:

GOVT: In March of 1992, Jerry Hoyack called before the grand jury and was given a grant of immunity . . . and we would like your Honor to essentially, for counsel's purposes, sort of refresh your order compelling his testimony.

COURT: Okay. Does the same order, is the Government saying that the same order of immunity that

Bustamante also points out that the government never charged Garcia with perjury. However, this fact is not sufficient to allow this Court to infer that the government was concealing Garcia's truthful testimony because it would have helped Bustamante. See *Taylor*, 728 F.2d at 936. In fact, the record reveals that before the government was aware that Bustamante wanted to call Garcia as a witness, the government had disclosed Garcia as an unindicted co-conspirator. This detail supports the government's statement to the trial court that it declined to further immunize Garcia because he had "outstanding criminal liability."

In sum, nothing in the record causes us to believe that the government was acting in bad faith by advocating its limited interpretation of Garcia's immunity. The record also does not in any way suggest that the trial court itself violated Bustamante's due process rights in making its ruling on Garcia's immunity. Accordingly, we conclude that Bustamante's due process rights were not implicated by the trial court's decision that the immunity order was limited to testimony before the grand jury.

Bustamante also argues that, even if the trial court correctly interpreted Garcia's immunity order, the court should have ordered immunity to stem the government's misbehavior. *See, e.g., Follin*, 979 F.2d at 374. As discussed

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took place before the grand jury, the Government intends to follow in trial, as well?
GOVT: Precisely.
COURT: So immunity is still being granted to the witness.
GOVT: Precisely.

above, the record does not support this argument. More importantly, Bustamante did not ask the trial court to grant immunity on any ground other than the existing immunity agreement. Bustamante makes no attempt to establish that the trial court was obligated to order immunity on its own initiative and we decline to bear this burden for him. *See Taylor,* 728 F.2d at 934 n. 3.

V. Prosecutorial Misconduct

Bustamante argues next that government counsel made numerous improper comments which caused the jury to be prejudiced against him. He contends that these instances of misconduct so permeated the trial that this Court should reverse his convictions.

A. Opening statement

Bustamante complains that, during its opening statement, the government maligned the defendants and certain witnesses, misstated evidence, attempted to establish Bustamante's guilty by association, and suggested that certain witnesses might lie. However, because Bustamante made no objection to any of these statements we will review only for plain error. *United States v. Andrews,* 22 F.3d 1328, 1341 (5th Cir.), *cert. denied,* ___ U.S. ___, 115 S.Ct. 346, 130 L.Ed.2d 302 (1994); *United States v. Bermea,* 30 F.3d 1539, 1564 (5th Cir.1994). To meet this standard, Bustamante must prove:

> (1) an error;
> (2) that is obvious or "so conspicuous that 'the trial judge and prosecutor were derelict in countenancing [it], even absent the defendant's

> timely assistance in detecting [it],' " *United States v. Calverley*, 37 F.3d 160, 163-64 (5th Cir.1994) (en banc) (quoting *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982)); and
>
> (3) that affected the defendant's substantial rights, usually by affecting the outcome of the proceeding, *id.* (citing *United States v. Olano*, ___ U.S. ___, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)).

In addition, we will correct a plain error affecting substantial rights only if it " 'seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings.' " *Id.* (quoting *United States v. Atkinson*, 297 U.S. 157, 56 S.Ct. 391, 80 L.Ed. 555 (1936)). *See also United States v. Rodriguez*, 15 F.3d 408, 414-15 (5th Cir.1994).

We have carefully reviewed the above statements of which Bustamante complains. Even if the district court abused its discretion in allowing them, which we doubt, such error certainly did not rise to the level of plain error.

B. Improper closing argument

Bustamante argues that, during its closing argument, the government improperly suggested that Jaffe, Garcia and Heard were guilty of criminal conduct and called attention to Bustamante's decision not to call them as witnesses. However, as the government points out, Bustamante's own counsel had already repeatedly highlighted the fact that the government did not call these witnesses. The district court overruled Bustamante's objection to this argument. The district court did not err in permitting

the government to respond to Bustamante's own argument suggesting that the jury draw unfavorable inferences from the government's failure to call these witnesses.

C. Improper cross-examination of Bustamante

Bustamante first complains that the government suggested that he had received other uncharged illegal gratuities by asking him twice "You've *never* gotten anything from Doug Jaffe?" At trial, Bustamante's attorney objected on the ground that the government was trying to introduce evidence of extraneous bad acts prohibited by Federal Rule of Evidence (FRE) 404(b). The government responded that these inquiries were directly relevant to the Falcon bribe, in addition to being fair impeachment questions. The district court apparently agreed, but limited the government's questioning to Jaffe's involvement in the $35,000 payment Bustamante received from Garcia. Bustamante now argues that the question itself was improper because it implied Bustamante had received other gratuities from Jaffe. We disagree. The record leads us to conclude that a reasonable jury would interpret this question as referring to the gratuity with which Bustamante had been charged, a matter which the government was entitled to explore.

Bustamante next complains that the government twice asked questions intimating that Bustamante had done other improper things in his past, then stated in the jury's presence that it had outside evidence to support these questions. Bustamante contends that the government thus gave unsworn testimony about his prior bad

acts. However, the record reveals that the government made these statements after Bustamante's attorney suggested in front of the jury that the government asked these questions in bad faith. In this context, the government's statements were not improper. In any event, these statements certainly do not amount to plain error, which is the applicable standard given that Bustamante never objected to them.

Bustamante also complains about two series of questions the government asked regarding two other specific instances of uncharged prior conduct: Bustamante's failure to report or pay taxes on certain income, and Bustamante's solicitation of an unrelated bribe in 1987. At trial, Bustamante objected that the government was introducing FRE 404(b) evidence without first disclosing it to the defense as required by a pretrial order. The government correctly responded that, because it was using this evidence to impeach Bustamante's credibility, FRE 404(b) did not apply. *United States v. Tomblin*, 42 F.3d 263, 282-83 (5th Cir.1994). The district court allowed both lines of questioning. Bustamante now contends that these questions were highly prejudicial.

Bustamante's argument places the cart before the horse. We assess the prejudicial quality of these questions only if we conclude that they were improper. *United States v. MMR Corp.*, 907 F.2d 489, 501 (5th Cir.1990), *cert. denied*, 499 U.S. 936, 111 S.Ct. 1388, 113 L.Ed.2d 445 (1991). They were not. FRE 608(b) allows the government to inquire into specific instances of conduct relevant to Bustamante's character for truthfulness. Both the failure to report income and the solicitation of bribes are relevant to the issue of honesty. *E.g.*, *Tomblin*, 42 F.3d at

282-83. The record reveals that, prior to embarking on each series of questions, the government informed the district court of the factual support for its inquiries, thus establishing a good faith basis for its questions. We conclude that the district court did not err in permitting these questions.

Lastly, Bustamante asserts that the government commented on his assertion of his fifth amendment rights before the grand jury. At the start of his direct examination, Bustamante stated "I've been waiting a long time for this day to come." On cross-examination, the government asked "You were given an opportunity to come in and tell the government your version [of the facts], weren't you?" and "I sent your attorney a letter inviting you to come in to the grand jury and tell your story under oath, at that time, didn't I?" The district court sustained Bustamante's objections to both questions.

On appeal, the government argues that these questions were properly designed to impeach Bustamante's earlier testimony. We disagree. The rule is well established that a witness generally may not be cross-examined about her choice to invoke the fifth amendment privilege in grand jury proceedings. *United States v. Robichaux*, 995 F.2d 565, 568 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 322, 126 L.Ed.2d 268 (1993). We need not consider the relationship between this rule and the government's right to impeach a witness, because in Bustamante's case the government was not fairly impeaching his earlier statement. Bustamante's general introductory remark that he had been waiting a long time for his trial date to arrive cannot be interpreted as a complaint that he had never before had a chance to

speak to the government or the grand jury. The government's remarks were thus improper.

This, however, is not the end of the inquiry. We will only find reversible error if the government's improper comments cast serious doubt on the jury's verdict. *United States v. Rocha*, 916 F.2d 219, 234 (5th Cir.1990), *cert. denied*, 500 U.S. 934, 111 S.Ct. 2057, 114 L.Ed.2d 462 (1991). In making this evaluation, we consider (1) the likelihood and degree that the jury was prejudiced by the remarks; (2) the effectiveness of any cautionary instructions given by the court; and (3) the strength of the legitimate evidence of the defendant's guilt. *Id.*; *Andrews*, 22 F.3d at 1341. In assessing prejudice, we consider several factors, including whether defense counsel objected to the improper remark, asked the court for a curative instruction or moved for a mistrial on the ground of the misconduct. *United States v. Wright-Barker*, 784 F.2d 161, 175 (5th Cir.1986). We consider the error in the overall context in which it occurred. *See Bermea*, 30 F.3d at 1564.

For a number of reasons, we conclude that these statements do not cast the jury's verdict into serious doubt. First, they were brief and the court sustained Bustamante's objections. Second, the court instructed the jury to disregard any questions or answers that it ruled improper. Third, counsel did not move for a mistrial or a curative instruction. Finally, the government's proof of guilt was strong. In the context of this three-week trial we are satisfied that these brief remarks did not prejudice Bustamante's substantial rights.[8]

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[8] Bustamante identifies several other questions as improper. First, he complains that, in its cross-examination of

VI. *Brady* Review

Bustamante asks this court to review the transcripts of the grand jury proceedings for exculpatory evidence that the government should have disclosed. Before trial, the district court reviewed these transcripts *in camera* and concluded that they contained no *Brady* evidence. Without arguing that the district court erred, Bustamante asks this Court to conduct its own review of the transcripts. However, we decline to scour the grand jury record without some showing either that the district court failed to identify *Brady* material or that the government failed to disclose it. *Jones v. Butler*, 864 F.2d 348, 356 (5th Cir.1988), *cert. denied*, 490 U.S. 1075, 109 S.Ct. 2090, 104 L.Ed.2d 653 (1989) (after district court holds in camera hearing, we will ordinarily not go beyond court's finding that records contain no *Brady* material). *See also United States v. Register*, 496 F.2d 1072, 1081 (5th Cir.1974), *cert. denied*, 419 U.S. 1120, 95 S.Ct. 802, 42 L.Ed.2d 819 (1975).

Laurence Macon, the government asked questions designed to inform the jury of evidence that the trial court had previously excluded. Second, he complains that, during Rebecca Bustamante's cross-examination, the government insinuated that Bustamante had used his official influence to advance Mrs. Bustamante's career. Lastly, he complains that the government attempted to elicit testimony about Bustamante's bad character from another defense witness. At trial, Bustamante's attorney objected to each of these remarks and the court sustained each objection. Counsel asked for neither curative instruction nor a mistrial. We are not persuaded that these isolated questions prejudiced Bustamante's substantial rights.

VII. Sentencing

Bustamante argues that the sentence for his RICO conviction was impermissibly enhanced by double counting. The district court determined Bustamante's base offense level of 19 from the RICO sentencing guideline, U.S.S.G. § 2E1.1, then increased that level by two for Bustamante's abuse of a position of public trust, under § 3B1.3. Bustamante argues that, because his congressional office was already used to satisfy the RICO enterprise element, the district court could not also properly enhance his sentence for abusing that office. This argument is meritless.

We agree with the analysis of the Seventh Circuit in *United States v. Ford*, 21 F.3d 759 (7th Cir.1994). In *Ford*, the court held:

> The crime of racketeering, [unlike simple bribery], does not in all cases entail an abuse of trust, so that the minimum base offense level of 19 already established for *all* RICO offenses does not already incorporate that element. Instead, the Sentencing Commission has determined that all RICO offenses merit a minimum offense level of 19, and those RICO offenses that entail an abuse of trust must, under the logic of the Guidelines, be distinguished on the basis of that additional element by receiving the two-level enhancement.

Id. at 766. See also *United States v. Butt*, 955 F.2d 77, 89 (1st Cir.1992).[9] The district court did not err in arriving at its sentence.

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[9] The RICO sentencing guideline allows a sentencing court to derive the base offense level either form the RICO guideline or by using the offense level from the underlying racketeering acts. In Bustamante's case, the district court used the base

VIII.

For the reasons stated above, Bustamante's conviction and sentence are affirmed.

AFFIRMED.

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offense level specified by the RICO sentencing guideline. We do not address whether our decision would be different had the court taken the base offense level from the underlying bribery and gratuity offenses, §§ 2C1.1 and 2C1.2, which do not allow the abuse of public trust enhancement.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8705

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

ALBERT G. BUSTAMANTE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion 2/13/95, 5 Cir., ___, ___ F.3d ___)

(April 5, 1995)

Before DAVIS, BARKSDALE and STEWART, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members

of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

COUNT FOUR

Title 18, United States Code, Section 201(g), and its successor statute, Title 18, United States Code, Section 201(c)(1)(B) [Gratuity]

23. The grand jury hereby repeats and realleges each and every allegation contained in paragraphs 1, 2, and 11 of the indictment.

24. Between in or about January 1985 and on or about October 28, 1988,

ALBERT G. BUSTAMANTE,

defendant herein, while serving as United States Congressman, did, directly and indirectly, knowingly solicit, accept, receive and agree to receive things of value personally, that is, a loan guarantee for the purchase of stock and the promise of future loans for additional investment in San Antonio Video Corporation, all at no personal risk to ALBERT G. BUSTAMANTE, from persons known to the grand jury, for and because of official acts performed and to be performed by ALBERT G. BUSTAMANTE, otherwise than as provided by law for the proper discharge of official duty, in violation of Title 18, United States Code, Section 201(g), and its successor statute, Title 18, United States Code, Section 201(c)(1)(B).

11. GENERAL ALLEGATIONS REGARDING AN ILLEGAL GRATUITY GIVEN TO ALBERT G. BUSTAMANTE THROUGH SAN ANTONIO VIDEO CORPORATION

A. During the period alleged in the indictment, San Antonio Video Corporation ("SAVC") was a corporation organized under the laws of Texas with offices located in San Antonio, Texas and elsewhere.

B. SAVC was formed by persons known to the Grand Jury ("SAVC's controllers") in or about the summer of 1984 for the purpose of attempting to obtain from the Federal Communications Commission ("FCC") a license to build and to operate a commercial television broadcast station in San Antonio.

C. In May 1984, ALBERT G. BUSTAMANTE won the Democratic primary election for the Twenty-Third Congressional District of Texas. By winning the primary, ALBERT G. BUSTAMANTE was assured of election to Congress, as he was virtually unopposed in the November general election. Shortly after ALBERT G. BUSTAMANTE won the primary, he was invited by SAVC's controllers to participate in SAVC at no personal risk to himself.

D. In or about April 1985, ALBERT G. BUSTAMANTE borrowed $15,000 on a $20,000 line of credit which had been guaranteed by an SAVC controller known to the Grand Jury. ALBERT G. BUSTAMANTE used the proceeds of this loan to purchase 15,000 shares of stock in SAVC.

E. On or about June 17, 1986, ALBERT G. BUSTAMANTE testified before the FCC in support of SAVC's application. In that testimony, ALBERT G. BUSTAMANTE falsely denied under oath that anyone had guaranteed the $20,000 line of credit for him.

F. ALBERT G. BUSTAMANTE used the proceeds of the loan described above to purchase a 16.57% equity share in SAVC. In the event the FCC awarded the license to SAVC, ALBERT G. BUSTAMANTE would have been required to invest an additional sum estimated at $650,000. SAVC's controllers agreed to provide additional loans to ALBERT G. BUSTAMANTE in this amount, at no personal risk to ALBERT G. BUSTAMANTE.

G. On or about November 5, 1986, the FCC rejected SAVC's application after determining that its "representations about material and fundamental facts regarding its qualifications cannot be relied on." The FCC further determined that an SAVC controller known to the grand jury had been "untruthful" concerning the application.

H. In or about June 1987, the FCC Review Board affirmed the rejection of SAVC's application for the license. Thereafter, in or about July 1988, SAVC entered into a settlement with the prevailing applicant, agreeing not to challenge further the FCC's decision in exchange for a monetary payment.

I. On or about October 24, 1988, SAVC received proceeds of the settlement. Thereafter, on or about October 27, 1988, ALBERT G. BUSTAMANTE received a check for $19,467.53 from an SAVC controller, which was the exact figure owed by ALBERT G. BUSTAMANTE on the loan that had previously been guaranteed for him so that

he could purchase his SAVC stock. On or about October 28, 1988, ALBERT G. BUSTAMANTE used these proceeds to repay the balance owing on the loan.

Supreme Court, U.S.
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No. 95-60

In the Supreme Court of the United States

OCTOBER TERM, 1995

ALBERT G. BUSTAMANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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JOHN C. KEENEY
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QUESTIONS PRESENTED

1. Whether the evidence showed that petitioner received an illegal gratuity, with knowledge of the donors' illicit purpose for providing the gratuity.

2. Whether the gratuity statute, 18 U.S.C. 201(c)(1)(B), and its statutory antecedent, 18 U.S.C. 201(g) (1982), require proof of a quid pro quo.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-60

ALBERT G. BUSTAMANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 45 F.3d 933.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 1995. A petition for rehearing was denied on April 5, 1995. Pet. App. 34-35. The petition for a writ of certiorari was filed on July 5, 1995 (the day following a legal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c), and of accepting an illegal gratuity, in violation of 18 U.S.C. 201(g) (1982) and its successor, 18 U.S.C. 201(c)(1)(B).[1] He was sentenced to 42 months' imprisonment, to be followed by two years' supervised release, and ordered to pay a $55,000 fine. The court of appeals affirmed. Pet. App. 1-33.

1. The evidence at trial showed that petitioner, a Member of Congress from 1984 to 1992, received an illegal gratuity in the form of a no-risk investment in a Texas corporation that was seeking a license to operate a television station. Pet. App. 2, 10-13.[2]

After petitioner won the primary election in 1984, he was unopposed in the general election, so his seat in the House of Representatives was virtually assured. Pet. App. 10. In the interim between the primary and the general election, petitioner was invited by two friends, Oliver S. Heard and R. Lawrence Macon, to participate in a new company, San Antonio

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[1] Petitioner was acquitted of RICO conspiracy (18 U.S.C. 1962(d)), and of seven other counts of receiving unlawful gratuities. Pet. App. 2.

[2] Petitioner's violation of the gratuity statute constituted one of the two predicate acts that formed the basis for his RICO conviction. Petitioner no longer contests the lower courts' findings respecting the other predicate act—acceptance of a $35,000 bribe in exchange for his attempt to influence the award of a military food services contract. See Pet. App. 4-10.

Video Corporation (SAVC), which had been formed to compete for a Federal Communications Commission (FCC) license for a new television broadcasting station. *Ibid.* Petitioner was expected to make an initial contribution of $15,000, which would entitle him to 16% of the company's non-voting stock. *Id.* at 11. If SAVC won the FCC license, petitioner would have been expected to make a further payment of $650,000, as his share of the station's start-up cost. *Ibid.* Heard and Macon intended, however, that SAVC would borrow the money needed for start-up, using the FCC license as collateral, and then lend the funds to those investors (like petitioner) who did not have the capital to make their secondary contributions. *Ibid.*

Petitioner, however, lacked even the $15,000 needed to make his initial capital contribution. Pet. App. 11. In April 1985, he therefore applied for a loan from Groos Bank in San Antonio, Texas. *Ibid.* According to bank documents, Heard served as guarantor for the loan, which was issued as the result of his specific request. *Ibid.* Three days earlier, the bank had made petitioner another $20,000 loan, also procured as a result of Heard's specific request and financial guaranty. *Id.* at 11-12.[3]

Petitioner failed to make the loan installment payments that were due in 1986, 1987, and 1988, but Groos Bank nonetheless allowed him to renew the loan in April 1988, in reliance on Heard's original guaranty. Pet. App. 12. At that time, petitioner took

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[3] In May 1985, in the course of hearings respecting the FCC's licensing determination, petitioner testified that he had obtained a loan to make his initial stock purchase, but denied that Heard had guaranteed the loan. Pet. App. 12.

out another loan to cover the interest that had accrued on the original loan. *Ibid.* The new loan was also covered by the Heard guaranty. *Ibid.* In July 1988, petitioner consolidated the two SAVC-related loans into a single $20,140.69 obligation, which was also backed by Heard's guaranty. *Ibid.* Petitioner made only two of the scheduled monthly payments on the consolidated loan. *Ibid.*

SAVC was not ultimately awarded the FCC license, but it received, in October 1988, a $175,000 settlement from the successful licensee. Pet. App. 12. On October 27, just three days after SAVC received that payment, Heard issued to petitioner a check for $19,467.53, the exact amount then outstanding on petitioner's bank loan. *Id.* at 12-13. SAVC's other investors did not receive similar treatment. Instead, they were notified that the money received in settlement would be applied first to pay off SAVC's outstanding bills, and that any remaining capital would be distributed pro rata. *Id.* at 13.[4]

2. Petitioner argued on appeal that the evidence failed to prove (i) that he knew of Heard's loan guaranty or (ii) that the Groos Bank loan was in fact risk-free. The court of appeals rejected those contentions, explaining that petitioner "was not merely accused of accepting these particular guarantees and promises, but of allowing Macon and Heard to shoulder the responsibility for his SAVC investments from start in 1984 to finish in 1988." Pet. App. 14. The prosecution was not, therefore, required to prove that the Groos Bank loan was risk-free; rather, "[t]he govern-

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[4] The record does not disclose whether the other shareholders received any of the settlement proceeds. Pet. App. 13.

ment was required to prove what it alleged—a risk-free investment carry." *Id.* at 15. Viewing the indictment in that light, the court concluded that there was ample evidence from which the jury could have found that petitioner knew that Heard and Macon provided him with a risk-free investment in SAVC. *Ibid.* It found particularly notable petitioner's receipt from SAVC of the precise amount of money that he needed to repay his bank loan (an amount that exceeded his actual investment), at a time when SAVC was not repaying its other investors. *Ibid.*

The court also rejected petitioner's suggestion (Pet. C.A. Br. 16 n.10) that conviction for receipt of a gratuity requires proof that the gratuity was given in exchange for an official act. Pet. App. 13, 16. It explained: "Generally, no proof of a quid pro quo is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office." *Id.* at 13 (citing *United States* v. *Evans*, 572 F.2d 455, 479 (5th Cir.), cert. denied, 439 U.S. 870 (1978)). Noting (Pet. App. 16) that petitioner brought no broadcasting experience to SAVC; that petitioner's Hispanic ethnicity was not the basis for SAVC's claim to a minority preference; and that petitioner "certainly added no financial strength to the venture," and considering (*ibid.*) that Heard's firm called on petitioner to assist it in his official capacity,[5] the court concluded that "the jury

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[5] In May 1985, Heard, whose firm specialized in collecting delinquent taxes for local governments, sought petitioner's assistance in obtaining a multi-million dollar contract from the City of San Antonio. Petitioner lobbied for Heard with the city council, and Heard's firm obtained the contract. Gov't C.A.

was entitled to find that Heard and Macon sustained [petitioner] because he was a member of the United States Congress." *Id.* at 16.[6]

ARGUMENT

1. Petitioner argues (Pet. 12-22) that the court of appeals erroneously held that the federal gratuity statute does not require proof that the recipient of a gratuity knew that he received the gratuity because of his official position. We agree with petitioner that the statute requires such a showing. As this Court indicated with respect to 18 U.S.C. 201(g) (1982) (the predecessor to 18 U.S.C. 201(c)(1)(B)), the government has the burden of demonstrating the recipient's "knowledge of the alleged briber's illicit reasons for paying the money." *United States* v. *Brewster*, 408 U.S. 501, 527 (1972).[7] The court of appeals in this case did not hold to the contrary.

Br. 12, 16. In April 1989, less than six months after SAVC issued the check to petitioner that allowed him to pay off his loans, Heard's firm obtained petitioner's assistance in an effort to amend a federal statute that exempted federal banking agencies and credit unions from local property taxes. *Id.* at 19.

[6] The court of appeals also rejected numerous other challenges to petitioner's conviction, and petitioner has not renewed those challenges here.

[7] Section 201(c)(1)(B) subjects to criminal liability any "public official, former public official, or person selected to be a public official, [who,] otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person." 18 U.S.C. 201(c)(1)(B). Its statutory precursor, 18 U.S.C. 201(g) (1982), was substantively identical.

The district court correctly instructed the jury that, to convict, it must find that petitioner "demanded, sought, received, accepted, * * * or * * * [agreed] to accept something of value personally," that he "did so, for, and because of an official act performed and to be performed by the defendant," and that he "sought or accepted the thing of value, knowingly and purposely, and not through misunderstanding, inadvertence or some other innocent reason." 16 R. 44-45. The court further stated that the jury should acquit if it were to find that "[t]he gratuities * * * were accepted in payment of professional services or as a matter of friendship or for social purposes only." *Id.* at 45. Petitioner did not contend on appeal that the instructions failed to require proof of scienter. Nor did he challenge the sufficiency of the evidence of his state of mind with respect to Heard's and Macon's reasons for providing him a no-risk investment.[8] Rather, as noted, petitioner argued only (1) that the bank loan was not risk free, (2) that he had no knowledge of Heard's guaranty, and (3) that the gratuity statute requires proof of a quid pro quo. The court of appeals thus had no reason to (and did not) address the adequacy of the government's proof of petitioner's knowledge respecting Heard's and Macon's motivations.

Petitioner relies, for his contrary characterization of the decision below, on a passage in which the court concluded that "it is sufficient for the government to show that the defendant was given the gratuity

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[8] Petitioner raised his challenge to the sufficiency of the evidence for the first time in his petition for rehearing, but did not challenge the jury instructions regarding scienter.

simply because he held public office." Viewed in context, that statement was merely a rejection of petitioner's claim that the government was required to prove a quid pro quo:

> To find a public official guilty of accepting an illegal gratuity, a jury must find that the "official accepted, because of his position, a thing of value 'otherwise than as provided by law for the proper discharge of official duty.'" Generally, no proof of a quid pro quo is required; it is sufficient for the government to show that the defendant was given the gratuity simply because he held public office. In addition, the jury need not find that the official accepted the gratuity with the intent to be influenced. The jury must only conclude that the evidence establishes beyond a reasonable doubt that the official accepted unauthorized compensation.

Pet. App. 13 (citations omitted). Because the issue was not raised by petitioner, the court did not purport to address the distinct question whether proof is required of the recipient's knowledge respecting the donor's intent.

To the extent that the decision below is interpreted to say anything about that issue, the court's reliance on its prior decision in *United States* v. *Evans*, *supra*, is instructive. In *Evans*, the court of appeals recognized that the government must prove that the defendant "accepted, because of his [official] position, a thing of value 'otherwise than as provided by law for the proper discharge of official duty.'" 572 F.2d at 480. It concluded, on the facts of that case, that "[t]he jury was well justified in concluding that Evans accepted the money and favors with knowledge that

the payments were made because of his official position." *Id.* at 482. The court in this case did not call into question that analysis.

2. Petitioner's challenge to the sufficiency of the evidence supporting his knowledge that he had been afforded a risk-free investment because of his official position is not properly raised for the first time in a petition for certiorari. See *United States* v. *Mendenhall*, 446 U.S. 544, 551 n.5 (1980). But even if the issue were fairly presented, it does not warrant this Court's review, because the evidence was sufficient to permit a rational trier of fact to find the elements of the offense beyond a reasonable doubt. *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979).

The evidence demonstrated that Heard and Macon provided petitioner with a risk-free investment from 1984-1988; that petitioner was invited to invest after his seat in Congress was assured; that petitioner brought no broadcasting experience, financial strength, or other unique attributes to the venture; and that, during the pendency of the investment, Heard's firm called on petitioner to assist them in his official capacity. The court of appeals found that evidence sufficient to demonstrate that "Heard and Macon sustained [petitioner] throughout his SAVC investment because he was a member of the United States Congress." Pet. App. 16. The evidence equally supports the inference that petitioner knew why he was receiving the no-risk investment.

3. Petitioner argues (Pet. 22-27) that the government is required to prove a quid pro quo under the gratuity statute, at least where (as here) the defendant is an elected official. He relies, for that proposition, on *McCormick* v. *United States*, 500 U.S. 257

(1991). Petitioner acknowledges (Pet. 27) that *McCormick* involved a prosection for extortion under the Hobbs Act, and that its holding "was expressly limited to an elected official's conduct vis-a-vis campaign contributions." He contends (Pet. 27), however, that the Court's reasoning in *McCormick* supports adoption of a quid pro quo requirement for prosecutions of elected officials, outside of the context of campaign contributions, under the federal gratuity statute.

The holding in *McCormick* reflected the Court's perception that Congress did not intend to subject to criminal liability a legislator who "act[s] for the benefit of constituents or support[s] legislation furthering the interests of some * * * constituents, shortly before or after campaign contributions are solicited and received from those beneficiaries." *McCormick*, 500 U.S. at 272. "To hold otherwise," the Court explained, "would open up to prosecution not only conduct that has long been thought to be well within the law but also conduct that in a very real sense is unavoidable so long as election campaigns are financed by private contributions or expenditures." *Ibid.* Although the Court did not hold that Congress lacked the power to enact such a criminal statute, it concluded that judicial recognition "would require statutory language more explicit than the Hobbs Act contains." *Id.* at 272-273.

The Court's concern with disrupting the nation's system of private campaign finance is not implicated in cases, like this, in which the elected official has been provided a purely personal benefit. Moreover, the text of Section 201(c)(1)(B) does not support the imposition of a quid pro quo requirement. The

statute (like its predecessor, Section 201(g)) subjects to criminal liability any public official who "receives * * * anything of value personally for or because of any official act performed or to be performed by such official." The absence of any quid pro quo element in that text is demonstrated by contrast with the text of the general bribery statute, 18 U.S.C. 201(b)(2), which subjects a public official to prosecution if he "corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally * * * *in return for* * * * *being influenced in the performance of any official act*" (emphasis added). The latter provision, which carries a greater penalty, evidences Congress's ability—when it so desires—to require, as an element of an illegal receipt crime, proof of the recipient's agreement to perform an official act.

The courts of appeals that have decided the issue have uniformly held that, unlike the bribery statute, the gratuity statute contains no quid pro quo requirement. See *United States* v. *Brewster*, 506 F.2d 62, 72 (D.C. Cir. 1974); *United States* v. *Niederberger*, 580 F.2d 63, 68-69 (3d Cir. 1978); *United States* v. *Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991); *United States* v. *Strand*, 574 F.2d 993, 995 & n.2 (9th Cir. 1978); *United States* v. *Johnson*, 621 F.2d 1073, 1076 (10th Cir. 1980). In *Standefer* v. *United States*, 447 U.S. 10, 14 n.8 (1980), this Court indicated its agreement with that interpretation, specifically approving jury instructions that did not require a finding of a quid pro quo to convict a donor of providing an unlawful gratuity, in violation of 18 U.S.C. 201(f) (1982). The court of appeals had noted, in that case, that the text of Section 201(f) mirrored that of

Section 201(g), and, having previously rejected the argument that Section 201(g) required proof of a quid pro quo, the court refused to read such a requirement into Section 201(f). See *United States* v. *Standefer*, 610 F.2d 1076, 1080 & n.8 (3d Cir. 1979) ("All that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of Niederberger's official position, and not solely for reasons of friendship or social purposes."). See also *Niederberger*, 580 F.2d at 68 n.10 (citing cases involving prosecutions under Section 201(f)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

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In The

Supreme Court of the United States

October Term, 1995

ALBERT G. BUSTAMANTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITIONER'S REPLY BRIEF

In opposing Petitioner's challenge to the Fifth Circuit Court of Appeals' interpretation of the federal gratuity statute, 18 U.S.C. § 201(c)(1)(B) [formerly 18 U.S.C. § 201(g)]. Respondent agrees that Petitioner's statement of the applicable law is correct. (Resp. 6) Respondent argues, instead, that review is unwarranted because the evidence was sufficient to support Petitioner's gratuity conviction. (Resp. 5-6 at n.5)

As set forth below, the "official" conduct relied on by Respondent is not based on the record evidence. Similarly, Petitioner's issues are not "raised for the first time in a petition for certiorari." (Resp. at 9)

I. PETITIONER NEITHER PERFORMED, NOR WAS REQUESTED TO PERFORM, "OFFICIAL ACTS" ON BEHALF OF OLIVER HEARD OR THE HEARD LAW FIRM.

Petitioner was convicted of receiving a gratuity in the form of a loan guarantee, and the promise of future loans, all at no personal risk. (Pet.App. 14-15) The court below construed the count of conviction broadly to encompass what was described as "the carry," or "a risk-free" investment. (*Id.*) Petitioner sought the loan in question to finance his purchase of an equity share in SAVC, a corporation formed to seek the purchase of a new television broadcasting license. (Pet.App. 11-12) Respondent does not contend that Petitioner either performed, or that Mr. Heard requested him to perform, any official act whatsoever in regard to the SAVC broadcast license application. (Resp. at 5) Nor does Respondent suggest that Petitioner's participation in the SAVC investment, in itself, constituted an "official act" within the meaning of the statute.[1]

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[1] 18 U.S.C. § 201(a)(3) provides in part that:

(a) For the purposes of this section –

(3) the term "official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

Relying on the opinion of the court below, Respondent describes the factual basis of Petitioner's gratuity conviction as follows:

> Noting (Pet.App. 16) that petitioner brought no broadcasting experience to SAVC; that petitioner's Hispanic ethnicity was not the basis for SAVC's claim to a minority preference; and that petitioner "certainly added no financial strength to the venture," and *considering* (*ibid.*) *that Heard's firm called on petitioner to assist it in his official capacity,* the court concluded that "the jury was entitled to find that Heard and Macon sustained [petitioner] because he was a member of the United States Congress." *Id.* at 16.

(Resp. at 5-6) (emphasis supplied). Respondent then argues that the foregoing evidence "equally supports the inference that petitioner knew why he was receiving the no-risk investment." (Resp. 9)

Respondent's opposition to Petitioner's request for review is fact based and is taken from the "Statement of Facts" section of the Government's brief in the court below. (Resp. 5-6 at n.5)

First, Respondent states that, in May of 1985, Mr. Heard "sought petitioner's assistance in obtaining a multi-million dollar contract from the City of San Antonio." According to Respondent, "Petitioner lobbied for Heard with the city council, and Heard's firm obtained the contract." (Resp. 5 at n.5) Second, Respondent states that, in April of 1989, "Heard's firm obtained petitioner's assistance in an effort to amend a federal statute that exempted federal banking agencies and credit unions from local property taxes." (Resp. 5-6 at n.5)

As the following discussion will reveal, Respondent's reliance on the Government's brief in the court below is misplaced.

A. There Is No Record Evidence That Petitioner Performed, Or Was Requested To Perform, "Official Acts" On Behalf Of Oliver Heard Or The Heard Law Firm In Regard To The 1985 City Tax Collection Contract.

In 1985, the San Antonio city council was considering whether to privatize its delinquent tax collection functions. During

the month of May 1985, the privatization issue was on the city council's agenda each week. If the City voted to privatize its tax collection function, it would award the collection contract to a law firm. Three law firms sought the contract from the City, one of which was the firm of Heard, Goggan, Blair and Williams, headed by Mr. Oliver Heard. The Heard firm had been collecting delinquent taxes for various taxing entities, including the surrounding county, for a number of years. A staff analysis of the various law firms, conducted by the City Attorney's Office prior to the vote, concluded that the Heard firm was best qualified to receive the contract.[2]

Though a majority of the city council was in favor of the privatization, two City Councilwomen, Ms. Helen Dutmer and Ms. Maria Berriozabal opposed the plan. The Government called Ms. Berriozabal to testify about the tax collection issue as it stood in 1985.

Specifically, the Government asked Ms. Berriozabal whether she had been lobbied before the vote by anyone to elicit either her support for, or opposition to, the privatization plan. Ms. Berriozabal testified that she had been lobbied to oppose privatization by a local citizens group, and had been lobbied to support the plan by Mr. John Heard, an attorney whose firm was seeking the collection contract from the City.[3] In response to questions by the prosecutor, Ms. Berriozabal stated that she had never been lobbied by either Oliver Heard, Larry Macon, or petitioner's wife, Ms. Rebecca Bustamante. Ms. Berriozabal was then asked if she had ever spoken with Petitioner about the tax contract:

> Q: All right. Did you ever speak with Albert Bustamante about the contract?

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[2] As described by Mr. Lowell Denton, the City Attorney in 1985, the factors that went into the decision to award the contract to the Heard firm were the size of the organization; the firm's assurance that they had the immediate computer capacity to do the job; and the fact that the Heard firm was already collecting taxes for the county and, thus, could do the job automatically by merely adding the City to the list. In addition, Mr. Denton testified, the Heard firm had a proven track record.

[3] John Heard is an attorney and the brother of Oliver Heard; he is, and was, not professionally associated with Oliver Heard.

A: Yes, sir.

Q: Albert Bustamante was in Congress at that point in time.

A: Yes, sir.

Q: All right. Tell us about this conversation, where did it take place and when did it take place.

A: I don't know when it took place. I just know –

Q: All right. Was it face to face –

A: – that it was before the vote. No, it wasn't face to face.

Q: Was it a telephone conversation?

A: Yes, sir. A phone call.

Q: All right. Do you know, do you recall where Congressman Bustamante was at the time?

* * *

A: I just, I thought he was calling from Washington.

Q: All right. It wasn't a local call here in San Antonio?

A: I'm not sure, sir.

* * *

Q: Now, how long did this telephone conversation take place? If you recall.

A: Five minutes, something like that.

Q: All right. What did the Congressman say to you about the proposal to privatize the tax collection contract?

A: He just told me that the firm of Oliver Heard was a good firm, they would do a good job for the city.

* * *

Q: All right. And What did Congressman Bustamante tell you about, did he ask for your support, did he ask you to vote a particular way?

* * *

A: He, just to say that it was a good firm. That they would do good work for the city.

(Vol. VII, 85-9)

Ms. Berriozabal's testimony, excerpted above, is the only evidence in the record to support Respondent's assertion that Oliver Heard "sought petitioner's assistance" in obtaining the multi-million dollar tax contract from the City of San Antonio. Plainly, there is no evidence that Mr. Heard sought petitioner's assistance in the matter. Nor does the evidence suggest that petitioner's telephone call to Ms. Berriozabal was anything but a purely personal or private act, as opposed to an "official" act, as defined at 18 U.S.C. § 201(a)(3).[4] Certainly, the privatization of the City of San Antonio's delinquent tax collection function was not a "question" or "matter" which could be brought before Petitioner in his official capacity as a United States Congressman, or which he would be called upon to take action or render a decision.

Nor does the record support Respondent's implication of a cause-and-effect relationship between Petitioner's telephone call to Maria Berriozabal and the City's ultimate decision to award the tax contract to Oliver Heard's firm. (Resp. 5 at n.5) A majority of the city council was already in favor of privatizing the tax collection function. Despite Petitioner's telephone call, Ms. Berriozabal voted against privatization of the City's tax collection function.

B. There Is No Record Evidence That Either Mr. Heard, Or The Heard Firm, "Obtained Petitioner's Assistance" In An Effort To Amend A Federal Statute.

According to Respondent, in April of 1989, "Heard's firm obtained petitioner's assistance in an effort to amend a federal statute that exempted federal banking agencies and credit unions from local property taxes." (Resp. 6 at n.5) The only evidence in the record to support Respondent's assertion comes from the

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[4] Like both Mr. Heard and Mr. Macon, in mid-1985, Ms. Berriozabal had known petitioner for more than fifteen years; their relationship extended back to the time when he served as county commissioner of Bexar County, Texas, and she served as secretary to the county judge.

testimony of Lowell Denton. Mr. Denton was the City Attorney for San Antonio, during the time the city council was considering the privatization issue. In 1986, Mr. Denton went to work for Oliver Heard where he managed the firm's San Antonio delinquent tax practice.

Toward the end of his direct testimony, Mr. Denton was asked to discuss a letter he had written to Petitioner in April of 1989. At the request of the prosecutor, Mr. Denton read the letter to the jury:

> Dear Congressman: In accordance with our telephone conversation this morning I am supplying you with a copy of the relevant federal statutes pertaining to the taxation of real property held by the FSLIC, FDIC, and the properties held by federal credit unions.
>
> For some reason, unlike other federal financial institutions, Congress has not subjected the assets of federal credit unions to state and local taxation. The problem that our local government clients are presently confronting involves assets foreclosed by the credit union. Because of the local market conditions, these properties are now being held for substantial periods of time off of the local tax rolls.
>
> We thank you on behalf of our clients for your commitment to assist us in attempting to analyze this problem and take appropriate steps at the Congressional level. As I indicated to you by telephone, I am available to assist you or your staff in any way that would be helpful . . .
>
> I would be pleased to go to Washington at your convenience to work toward resolution of these issues. I look forward to discussing our options with you at your earliest convenience."

Asked why he had written the letter to Petitioner, Mr. Denton responded:

> A: Because I felt like it was wrong for Congress to exempt a federal credit union for paying a local ad valorem tax, when every other institution pays it.

Mr. Denton explained that he disagreed with the federal credit union exemption, and had addressed his complaints not only to

Petitioner, but to Congressman Henry B. Gonzalez, who served on the banking committee;[5] and to Senators Bentsen and Gramm.

On cross-examination, in response to questions by defense counsel, Mr. Denton made clear that, in writing Petitioner and other members of Congress, he was attempting to bring his personal views to the attention of his elected representatives:

Q: Now, is it fair to say that, and based upon what you've testified to earlier, that *the reason you wrote this letter is because you felt like the was wrong*? (Emphasis supplied)

A: That's true.

* * *

Q: Let me rephrase it, Mr. Denton, so that there's no mistake about it, and so that this jury understands. *The reason you wrote this letter to Congressman Bustamante is because you, personally, Mr. Lowell Denton, felt it was wrong for the Government to be sitting on these properties and not have to pay taxes on them.*

A: Well, I have to break your question down to answer it. *I did feel that way, still feel that way. I think I wrote the letter because I felt like the clients were entitled to have that problem addressed by Congress.* (Emphasis supplied)

Q: And the clients, these are the taxing entities?

A: That's correct.

Q: And so, on behalf of your clients that you represent, you have a right to alert your Congressman to something you feel like is wrong.

A: Yes, sir.

Q: And it's just unjust.

A: Yes, sir.

Q: And you still feel that way today?

A: Yes, sir, I do.

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[5] While a member of Congess, Petitioner served on the Armed Services committee.

Q: And, if the Congressman looked at this and said, I agree, I think that's wrong, and it's not right. And he took steps to change it. And let's say it was changed, and these properties were put on the tax rolls. It does not follow from that, that either you, Oliver Heard, Heard Goggan Blair, or anybody associated with you or that law office, was going to gain one red cent. Was it?

A: That was not my purpose in writing the letter.

The excerpted testimony of Mr. Lowell Denton is the only evidence in the record to support Respondent's assertion that, in April of 1989, "Heard's firm obtained petitioner's assistance in an effort to amend a federal statute that exempted federal banking agencies and credit unions from local property taxes." (Resp. 6 at n.5) There is no evidence in the record that Mr. Denton was directed to write a letter to Petitioner, or any other member of Congress, by Mr. Heard, or by anyone else at the Heard firm. Nor, indeed, is there any record evidence that Mr. Heard had knowledge of Mr. Denton's contacts. Surely, Petitioner's conduct in speaking with Mr. Denton on the telephone, and receiving his letter of complaint, was simply the usual and ordinary business of a representative and legislator.

We suggest that Petitioner's "acts," as described by Ms. Berriozabal and Mr. Denton, are not the sort of acts contemplated by the gratuity statute. If Petitioner's contacts with Ms. Berriozabal and Mr. Denton are deemed sufficient to support his conviction, then the notion of what constitutes an "official act" has been expanded far beyond the plain language of the text. Surely, the ordinary acts of an individual are not transformed *ipso facto* into "official acts" merely because the individual is elected to public office. Contrary to Respondent's position, the facts of Petitioner's case suggest that review by this Court is warranted.

II. THE PROBLEM WITH *UNITED STATES V. EVANS.*

Respondent argues that, because Petitioner did not raise the issue in the court below, the distinct question of "whether proof is required of the recipient's knowledge respecting the donor's intent" was not addressed. (Resp. 8) Respondent points out that the court below resolved Petitioner's sufficiency challenge by relying on its

earlier decision in *United States v. Evans,* 572 F.2d 455 (5th Cir. 1978) (en banc). (Resp. 8-9) Respondent further argues that the Fifth Circuit did not call into question its earlier analysis of the gratuity statute in the context of Petitioner's case. (Resp. 8-9)

To be sure, *Evans'* articulation of the level of *mens rea* required to support a gratuity conviction conflicts with this Court's interpretation of the statute in *United States v. Brewer,* 408 U.S. 501 (1972), by eliminating the question of the donee's knowledge of the donor's intent. *United States v. Evans,* 572 F.2d at 480. Thus, in *Evans,* the Fifth Circuit concluded:

> [Section] 201(g) makes it criminal for a public official to accept a thing of value to which he is not lawfully entitled, *regardless of the intent of the donor or donee.*

Id. (emphasis supplied).

In applying *Evans* to Petitioner's case, the court ignored the issue it had explicitly left open, viz, whether a higher level of *mens rea* is required under the gratuity statute when applied to the conduct of an *elected* public official. *Id.* at 481 n.30. Having failed to consider the issue left open in *Evans,* it is unsurprising that the Fifth Circuit failed to address the question of whether Petitioner had the requisite knowledge of Heard's intent. Under *Evans,* that inquiry was irrelevant.

III. PETITIONER'S ISSUES ARE NOT PRESENTED FOR THE FIRST TIME IN A PETITION FOR CERTIORARI.

Respondent argues that this Court should decline to grant the writ because Petitioner's claims are "not properly raised for the first time in a petition for certiorari." (Resp. 9) On the contrary, Petitioner moved for judgment of acquittal on the gratuity count in the trial court on the specific ground that the Government had failed to prove any connection between the gratuities alleged and any of Petitioner's official acts. (Pet. 9-10) On appeal, Petitioner challenged the sufficiency of the evidence to convict him of having received an illegal gratuity, and framed his issue broadly, *viz.*:

> The Government Failed To Prove That Mr. Bustamante Knowingly Received An Unlawful Gratuity In

Exchange For "Official Acts Performed And To Be Performed" As Alleged In Racketeering Act Number 3.[6]

On appeal, Petitioner argued that the Government had failed to prove his knowledge of the existence of the Heard loan guarantee, or any linkage between the benefit received and his official conduct. (Appt.'s Br. C.A., 25-33)

Following the affirmance of his convictions, Petitioner filed a timely Petition For Panel Rehearing, and timely Suggestions Of A Party For Rehearing En Banc. There, Petitioner specifically challenged the court of appeals' broad interpretation of the federal gratuity statute (Sugg. Rehr'g En Banc C.A., 6-7); argued that the court had effectively dispensed with the requirement of *mens rea* (Sugg. Rehr'g En Banc C.A., 6-7, 12-13); and pointed out the court's failure to address the issue of *mens rea* left open in *United States v. Evans, supra.* (Sugg. Rehr'g En Banc C.A., 7-9, 13)

The court below was presented with all of Petitioner's issues fully, fairly, and directly.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that this Honorable Court will grant certiorari to review the decision of the court of appeals in this case.

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[6] Racketeering Act 3 is identical to the substantive offense charged in Count Four.

Respectfully submitted,

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